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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 742

HARRY KAISER and SUSAN KAISER,
Defendants-Petitioners,

vs.

THE STATE OF NEW JERSEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, APPELLATE DIVISION, OF THE STATE OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, APPELLATE DIVISION, OF THE STATE OF NEW JERSEY.

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THE STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, APPELLATE DIVISION, OF THE STATE OF NEW JERSEY.

Petitioners, Harry J. Kaiser and Susan Kaiser, pray that a writ of certiorari issue to review the judgment of the Superior Court, Appellate Division, of the State of New Jersey entered on May 14, 1962, affirming the convictions of Petitioners, in the Bergen County Court, Law Division on May 18, 1961 and the judgment of the Superior Court, Appellate Division, of the State of New Jersey, entered on July 17, 1963, affirming the denial by the Bergen County Court, Law Division, of Petitioners' motions to vacate the judgments of convictions and for a new trial, rendered December 7, 1962.

Opinions Below.

The opinion of the Superior Court, Appellate Division, of the State of New Jersey, affirming the convictions of the defendants-petitioners is reported in 74 N. J. Super. 257, 181 A. 2d 184 and is printed in Appendix "A" hereto.

The opinion of the Superior Court, Appellate Division, of the State of New Jersey, affirming the denial by the Bergen County Court, Law Division, of defendants-petitioners' motions to vacate the judgments of conviction and for a new trial is reported in 80 N. J. Super. 176, 193 A. 2d 270 and is printed in Appendix "B" hereto.

The oral opinion of the Bergen County Court, Law Division, Galanti, Judge is unreported and is printed in Appendix "C".

Jurisdiction.

The judgment of the Superior Court, Appellate Division of the State of New Jersey, affirming the convictions of Petitioners, was entered on June 23rd, 1962. Petition for Certification was filed with the New Jersey Supreme Court which was denied on July 17, 1962.

The judgment of the Superior Court, Appellate Division of the State of New Jersey, affirming the denial by the Bergen County Court, Law Division of Petitioners' motions to vacate the judgments of convictions and for a new trial, was entered on July 17, 1963. Petition for Certification was filed with the New Jersey Supreme Court which was denied on November 26th, 1963.

The statutory provisions conferring jurisdiction on this Court to review the judgments of the Superior Court, Appellate Division, of the State of New Jersey is Title 28

U. S. C. Section 1257(3), since the petitioners are claiming rights, privileges or immunities under the Constitution of the United States.

Questions Presented.

1. Did the admission into evidence at the trial of the Petitioners of articles seized under a search warrant which the State now concedes was issued on an application which "falls short of the standards recently enunciated by [the New Jersey] Supreme Court" in a pre-Mapp search seizure, trial and conviction, violate the Constitutional rights of the Petitioners under the IVth, Vth and XIVth Amendments of the United States Constitution?

2. Did the failure to object at a pre-Mapp trial to the introduction into evidence of articles which were the product of an illegal search and seizure, resulting from a search warrant now concededly issued on a defective application, bar the Petitioners from later raising the violation of their Constitutional rights under the IVth, Vth and XIVth Amendments of the United States Constitution in the State Court by application to vacate the judgments of convictions and to grant a new trial after *Mapp* v. *Ohio*, 367 U. S. 643, was decided?

3. Did the failure of Petitioners to urge on the argument of their appeals before the Superior Court, Appellate Division, from their convictions and in their Petition for Certification to the Supreme Court of New Jersey, as grounds for the reversal of their convictions, the illegality of the search, seizure and introduction into evidence of the seized articles in violation of their Federal Constitutional rights under the IVth, Vth and XIVth Amendments, amount to a waiver of their constitutional rights in the circumstances

present in this case that at the time of arguing their appeal in the Appellate Division and in Petitioning for Certification, there was no appellate court precedent in New Jersey indicating that the decision in *Mapp* v. *Ohio, supra*, would be given retroactive effect to pre-Mapp convictions where there was nothing in the record then before the Appellate Division and before the Supreme Court from the court below, suggesting a basis for questioning the reasonableness of the search and seizure?

4. May a pre-Mapp conviction, involving the introduction of illegally seized evidence, be attacked collaterally, by way of a motion to vacate the judgments of convictions and for a new trial, to assert violations of federal constitutional rights under the IVth, Vth and XIVth Amendments to the Constitution of the United States, when the Revised Rules governing the Courts of New Jersey permit the trial court in a criminal matter, where no procedure is specifically prescribed to proceed in any lawful manner, not inconsistent with the Constitution, the rules or any applicable statute?

5. Does the judgment of the Superior Court of New Jersey, Appellate Division, affirming the denial by the trial court of Petitioners' motion to vacate the judgments of convictions and grant a new trial on the ground of the violation of their federal constitutional rights under the IVth, Vth and XIVth Amendments, resulting from the illegal seizure of the proofs upon which the convictions were based stand on an independent, adequate state ground?

6. Has the judgment of the Superior Court of New Jersey, Appellate Division, passed on the federal constitutional rights of the Petitioners and decided them in a manner not in accord with the applicable decisions of the Supreme Court of the United States?

Constitutional Provisions Involved.

The Constitutional provisions which the case involves are the IVth, Vth and Sec. 1 of the XIVth Amendments to the Constitution of the United States which are set out annexed as Appendix U, 56a.

Statement of the Case and of How the Federal Questions Are Presented.

This was a pre-Mapp conviction, the jury finding the defendants guilty of conspiracy, maintaining a nuisance, permitting the carrying on of a lottery and possession of papers pertaining to a lottery, on May 18, 1961, based on a pre-Mapp search under a search warrant issued on an application on whet the State now concedes "falls short of the standards recently enunciated by our Supreme Courts."

At the trial evidence which had been seized under this search warrant when a search was made of the home of the defendant Susan Kaiser was admitted into evidence without objection on the part of the defendants because New Jersey was one of the States which at that time did not follow the exclusionary rule laid down in *Weeks* v. *United States* but admitted all relevant evidence, whatever its source.

On June 19, 1961, *Mapp* v. *Ohio* was decided by this Court. At the time of this decision it could not be fairly known from the opinion if "Mapp" was to have any retroactive application, or, if it was would this be limited to those cases of a pre-Mapp seizure but wherein trial had not yet taken place (see *State* v. *Valentin*, 36 N. J. 41), or if it would apply to pre-Mapp convictions also, based upon admitted evidence, illegally seized, following an illegal search.

On June 23, 1961, four days after "Mapp" was decided, and before there was any state court decision in New Jersey on the subject, or any expression by the Supreme Court of the United States as to the application of "Mapp" to pre-Mapp convictions, Petitioners filed their Notice of Appeal from the judgments of conviction and proceeded to perfect their appeal. After their brief on appeal was prepared and filed but before Petitioners argued their appeal on February 26, 1962, the case of *State* v. *Valentin*, *supra*, was decided by the New Jersey Supreme Court. The *Valentin* case was not a pre-Mapp conviction. It was before the Supreme Court which had granted leave to the defendants therein to appeal from the denial of a pre-trial motion to suppress evidence illegally seized, prior to the "Mapp" decision on June 19, 1961. Since the case had not yet been tried and the challenged evidence had not yet been offered at the trial, the New Jersey Supreme Court gave a limited application to "Mapp" and remanded the case to the trial court to permit both sides to introduce all relevant evidence on the new issue generated by "Mapp" (36 N. J. at p. 34) even though the police in the *Valentin* case did not have a warrant to make the search which produced the evidence which the defendant was seeking to have suppressed.

On February 26, 1962, when the Petitioners argued their appeal in this case before the Superior Court, Appellate Division, there was still no New Jersey appellate decision or had anything been decided by the Supreme Court of the United States, to indicate that the "Mapp" decision would be given retroactive effect to pre-Mapp convictions had in New Jersey upon illegally secured evidence.

The only decision on the subject was to the contrary. That was in the case of *State* v. *Long*, 71 N. J. Super. 583, a County Court case, which held that "Mapp" was not to be given retroactive effect but only prospective effect, as

far as pre-Mapp convictions were concerned, base upon illegally secured and admitted evidence.

No point was raised at the argument on February 26, 1962, on the appeal to the Appellate Division, of the Superior Court from the convictions, by Petitioners' counsel that "Mapp" had retroactive effect on pre-Mapp convictions. As the law stood in *Wolf* v. *Colorado*, 338 U. S. 25, prior to "Mapp" and as *State* v. *Long*, *supra*, pointed out, the point could not be successfully raised in New Jersey against the introduction of illegally secured evidence. And unless "Mapp" was to have a retroactive effect, the point could not be raised at all by Petitioners. The Superior Court, Appellate Division, by opinion issued May 14, 1962, affirmed the convictions.

On June 4, 1962, the case of *State* v. *Smith*, 37 N. J. 481, was decided. A very limited retroactive effect of "Mapp" was indicated by the decision of the Supreme Court. The holding in "Mapp" was not actually applied by the Supreme Court in the *State* v. *Smith* case; it was just discussed. The Supreme Court affirmed the judgment, holding the seizure was the result of a lawful arrest for an offense committed in the officers' presence, but in its discussion of the applicability of "Mapp" it suggested that it might be that as to the States the rule of exclusion would be confined to situations in which bad faith or indifference to the constitutional right was palpable (37 N. J. at p. 492).

This case was decided on June 4, 1962. Petitioners, on June 25, 1962, twenty-one days after *State* v. *Smith*, *supra*, was decided, filed their printed Petition for Certification with the New Jersey Supreme Court to review the judgment of the Superior Court, Appellate Division, affirming their convictions. No point was raised in the Petition for Certification that "Mapp" had retroactive effect on pre-Mapp convictions. At that time there was still no appellate

court in New Jersey holding that "Mapp" would be given retroactive effect to pre-Mapp convictions.

On September 17, 1962, the Supreme Court of New Jersey denied Petitioners' petition for certification, without opinion, 38 N. J. 310 (1962).

On October 26, 1962 Petitioners then moved before the Bergen County Court, Law Division where they had been convicted, for an order vacating the judgments of convictions and for a new trial, based upon the illegal seizure of the proofs upon which their convictions were based and the insufficiency of the application upon which the search warrant was issued and the holding of the Supreme Court of the United States in *Mapp* v. *Ohio*, *supra*, was urged in support of the motion. The motion was denied for the reasons appearing in the opinion of the trial judge (Appendix "C", 25a).

The Superior Court of New Jersey, Appellate Division, then affirmed the denial of the motions by the trial judge to vacate the judgments of convictions, for the reasons appearing in its opinion (annexed in Appendix "B", 17a). Petitioners then filed their Petition for Certification with the New Jersey Supreme Court to review the judgment of the Superior Court, Appellate Division, affirming the denial by the trial court of their motions to vacate the judgments of conviction and to grant a new trial.

On November 26, 1963, the Supreme Court of New Jersey denied the Petition for Certification without opinion, 41 N. J. 200 (1963).

On December 9, 1963, a stay of execution of sentence was applied for to allow Petitioners to make this application to the Supreme Court of the United States for a Writ of Certiorari to review the judgments of the Superior Court, Appellate Division. A stay was granted, conditioned on the Petitioners making application to the Supreme Court of the United States for certiorari by January 8, 1964.

Reasons for Granting the Writ.

(a)

It seems clear now that the admission by a state court into evidence in a criminal trial of articles seized under an illegally seized search warrant would violate the defendant's constitutional rights under the IVth Amendment, made binding upon the States by the XIVth or Due Process Amendment. This is the result of the holding of the Supreme Court of the United States in *Mapp* v. *Ohio*, 367 U. S., 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). It might possibly violate the Vth Amendment also (see concurring opinion of Mr. Justice Black at 367 U. S. 661). This now compels the state courts in all post-Mapp seizures to refuse to permit the illegally seized articles to be admitted into evidence.

But a more difficult problem arises when we come to consider pre-Mapp searches, seizures, trials and convictions.

Under *Wolf* v. *Colorado*, 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), the majority held that the illegal search and seizure was a violation of the person's right of privacy, guaranteed to him by the IVth Amendment. *Mapp* v. *Ohio*, *supra*, reaffirms this. The cases differ only in the manner in which the constitutional right is to be protected and vindicated. *Wolf* v. *Colorado* left it to the States to determine what consequences were to follow from an illegal search and seizure by state officers. "Mapp" held that exclusion of the evidence was the only effective method to protect the citizen in his right of privacy guaranteed to him by the IVth Amendment, from illegal state intrusions.

The application for the search warrant in this case was made on July 14, 1960. The search and seizure under it

was made at the home of the Petitioner Susan Kaiser, on the same day. The trial took place on May 15 to May 18, 1961, at which time the seized articles were admitted into evidence. The violation of the Petitioners' federal constitutional rights under the IVth Amendment and XIVth Amendment occurred during the period between July 14, 1960 and May 18, 1961, all before *Mapp* v. *Ohio*, decided on June 19, 1961. At that time *Wolf* v. *Colorado*, *supra*, was the law and New Jersey, which did not follow the exclusionary rule of *Weeks* v. *United States*, 1914, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed 652, admitted into evidence all evidence, no matter how it was obtained, if relevant. So at Petitioners' trial, as the law then stood, no successful objection to the admissability of the articles seized under the defectively issued search warrant could be made and so it was not made in this case, though the search and seizure were violations of Petitioners' federally constitutional rights of privacy under both *Wolf* v. *Colorado* and the later decided case of *Mapp* v. *Ohio*, *supra*. Though conviction occurred in Petitioners' trial, the earlier violation of the constitutional right was not dissipated and the admission into evidence aggravated the previous violations. The Petitioners were still free to seek some vindication of their violated rights, even after conviction.

(b)

In *State* v. *Valentin*, 36 N. J. 41, the New Jersey Supreme Court gave some acknowledgment to the holding in "Mapp" as it applied to pre-Mapp seizures where trial was yet to be had. But when *State* v. *Valentin* was decided there was no indication that the New Jersey Supreme Court would give any retroactive effect to pre-Mapp convictions, while *State* v. *Long*, 71 N. J. Super. 583, a County Court decision, held that retroactive effect would not be given to pre-Mapp

convictions. When *State* v. *Smith*, *supra*, was decided on June 4, 1962, not much more was offered. To sense the climate of thought and lack of certainty that followed "Mapp", a reference to the following several excerpts from *State* v. *Smith* will be of use:

. . . . . .

"The first question is whether Mapp must be applied to a search made before June 19, 1961, the date of that decision. There is no easy solution to the problem of retroactive application of decisional law in criminal matters. We seek essential justice both to the individual and to the community. If a prior judgment is fundamentally unfair in the light of a later decision, there is strong compulsion to reopen. But a change of law need not mean the earlier rule was so plainly wrong that every judgment in which it figured must be unjust."

. . . . . .

"Concepts of Justice change. Doctrines, incomprehensible today, were once embraced by judges who in their times were doubtless the epitome of the reasonable man. Surely this is so in long range retrospect. It is equally true that at the moment of change the choice is not necessarily between dead right and dead wrong. The judicial scene is studded with issues upon which conflicting views command respectable support. When a court alters its course, it is often but a preference, a belief that justice is better served in another way, with no intimation that whoever disagrees must be mean or inane."

. . . . . .

"What we have said would bear upon whether a pre-Mapp conviction may be assailed either on direct appeal or on collateral attack."

. . . . . .

"The precise contours of Mapp are yet unclear."

* * * * * *

"Our Rules require that objection to the admission of evidence be made at the trial. R. R. 1:5-1".

As is pointed out above, the Court, 37 N. J. p. 489, stated it was not deciding on a pre-Mapp conviction where there was nothing in the record from the court below to suggest a basis for consideration of the admissibility of the illegally secured evidence.

That is the uncertainty that surrounded the effect to be given to the "Mapp" decision when the Petitioners filed their Petition for Certification with the New Jersey Supreme Court on June 25, 1962.

(c)

The opinion and judgment of the Superior Court, Appellate Division, affirming the denial by the trial court of the motions to vacate the judgments of convictions and for a new trial (Appendix "B", 17a), seems to be based upon the asserted failure of the Petitioners to raise their federal constitutional claims when arguing their earlier appeal from their convictions before the Superior Court, Appellate Division and in not urging them in their Petition for Certification to the Supreme Court from the Appellate Division affirmance. The concluding sentence of the judgment and opinion (Appendix "B", 17a) is as follows:

"They did not do so, and they will not be permitted now to attack it collaterally."

The words "waiver" or "forfeiture" or "exhaustion of state remedies" are not used specifically but that is the effect of the court's holding. But is it accurate? As far

as "waiver" is concerned the definition in *Johnson* v. *Zerbst*, 304 U. S. 453, is perhaps the most cogent:

> "Waiver is ordinarily 'an intentional relinquishment of a known right or privilege'."

Tested by that standard and the circumstances present at the times, can it be fairly said there was a waiver of the Petitioners' federal constitutional claims by not urging them on their first appeal argued on February 26, 1962. The decision of this Court in "Mapp" did not indicate whether it was to have any retroactive effect or was to only be of prospective application. There was nothing in the record from the Court below concerning the illegality of the search warrant or the illegality of the search or the possible exclusion of the evidence seized under the warrant, when that record was before the Superior Court Appellate Division. The Supreme Court in *State* v. *Valentin, supra*, made no reference to retroactive effect on pre-Mapp convictions. *State* v. *Smith* had not as yet been decided. The illegal search and seizure could not have been successfully argued in the Appellate Division on the record before it containing no reference to the illegality of the warrant or the search or the seizure.

When the Petition for Certiorari was filed on June 25, 1962, twenty-one days after *State* v. *Smith* was decided, there was nothing in the record before the Supreme Court from the lower court that would warrant consideration of Petitioners' federal constitutional claims. There was nothing in the opinion in *State* v. *Smith* that would suggest in that state of the record that the Supreme Court could have given any consideration to Petitioners' federal claims. This was far removed from the "intentional relinquishment of a known right or privilege".

As has been held lately by this court in *Fay* v. *Noia*, 372 U. S. 391, 9 LEd 2d 837 (963) "waiver" to be effective, must be knowingly and understandingly done.

There was no abandonment of petitioners' federal constitutional claims; there was no opportunity to assert them on the record then before the court; there was no existing precedent to indicate that they would be considered by the court at that point in the litigation.

(d)

Nor can the decision of the Appellate Division of the Superior Court be deemed to rest on "failure to exhaust state remedies. Following the denial of the Petition for Certification, Petitioners sought to secure an adjudication of their federal constitutional claims in the state action by applying to have the judgments vacated and for a new trial and they asserted their federal constitutional claims as grounds in their motion (Appendix Q, 51a) and to challenge the application on which the warrant issued. The record below for the first time contained an assertion of the illegality of the warrant and the search made under it. On appeal to the Superior Court, Appellate Division, from the order of the trial court denying the motion to vacate the judgments of convictions and for a new trial, the federal constitutional claims of illegal search and seizure were again urged there. When the Appellate Division of the Superior Court affirmed the denial of the motion to vacate the judgments of convictions and for a new trial, the constitutional claims of illegal search and seizure were urged in the Petition for Certification filed with the Supreme Court of New Jersey. At the earliest moment, when the record showed a basis for questioning the reasonableness of the search, they were urged: in the trial court, the Appel-

late Division of the Superior Court and in the Supreme Court. There has been a full exhaustion of state court remedies.

(e)

There is nothing in the decisional law of New Jersey to the effect that an objection to evidence not raised below must be raised on appeal even though the record from the lower court fails to reflect the evidentiary question, with the exception of this judgment of the Appellate Division sought to be reviewed herein.

There is a Rule (referred to in *State* v. *Smith*, 37 N. J. at p. 489) that requires objection to the admission of evidence to be made at the trial. This is Revised Rule 1:5-1 (Appendix W, 59a).

The motion to vacate the judgments of convictions and for a new trial, based on the insufficiency of the application for the search warrant and the search and seizure made thereunder and the improper admission of the evidence secured thereby, contrary to the holding in *Mapp* v. *Ohio, supra*, was a motion made to the trial court and the only logical and legal method that could be employed by the Petitioners to raise the point where the record did not otherwise reflect it.

That the trial court could have entertained the motion and given appropriate consideration to the federal claims being asserted is supported by a reference to Revised Rule 3:11-9 (Appendix S, 54a).

New Jersey, at the present posture of affairs is denying all relief and all consideration to the Petitioners who have been subjected to a conceded violation of their federal constitutional rights, because they did not do, what on the record they could not do, at the time but which they later tried to do by supplementing the record by their motions

to vacate the judgments and for a new trial on the illegality of the search and the seizure by reason of the insufficiency of the application for the search warrant.

(f)

The judgment of the Appellate Division of the Superior Court, affirming the denial of Petitioners' motion to vacate the judgments of convictions and for a new trial, and refusing to consider Petitioners' constitutional claims on the merits does not stand on an independent, adequate, non-federal ground, as that phrase has been interpreted by the Supreme Court of the United States.

In *Williams v. Georgia*, 349 U. S. 375, Justice Clark, in a dissenting opinion, stated:

> "A purported state ground is not independent and adequate in two instances".

Referring to the Second instance he said:

> "When state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of the enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights."

Similar expression by Mr. Justice Harlan in *NAACP v. Alabama*, 357 U. S. 449, clarify what an independent, adequate state ground consists of.

A pertinent reference in his opinion is the following:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court (for those) who in justifiable reliance on prior decisions, seek vindication in state courts of their federal constitutional rights.

(g)

The judgment of the Superior Court, Appellate Division, affirming the denial of Petitioner motions to vacate the judgments of conviction and for a new trial passed upon Petitioner's federal constitutional claims in this manner. At page 23a of Appendix B, the Appellate Division held that the question of the constitutional illegality of the search and seizure could not be raised by a collateral attack on the judgment of conviction. This holding is at variance with the holding of the Supreme Court of the United States in *Fay* v. *Noia, supra,* where the federal constitutional claims were first raised after the time to appeal had expired by a *coram nobis* application in the State Court and on denial, in a habeas corpus application in the United States District Court.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. CORCORAN, JR.,
Attorney for Petitioners.

APPENDIX A

Opinion of Superior Court of New Jersey, Appellate Division on Judgment Affirming Conviction of Petitioners, One of the Judgments Here Sought to Be Reviewed.

ARGUED February 26, 1962—Decided May 14, 1962

Before JUDGES PRICE SULLIVAN and LEWIS

The opinion of the court was delivered by

PRICE, S. J. A. D. Defendants Harry Kaiser and Susan Kaiser, his mother, appeal from judgments of conviction based on the verdict of a jury in the County Court. Indictments were returned against appellants charging them with maintaining a building "as a nuisance" by permitting and by "carrying on knowingly" the "business of lottery or lottery policy" therein, "contrary to the provisions of N. J. S. 2A:130-3"; and with "being the owners of a building" and "unlawfully and knowingly" permitting "the business of lottery and lottery policy, * * * to be carried on by themselves and their agents, contrary to the provisions of N. J. S. 2A:121-3(c)." In addition, appellants, together with Edna Kaiser (wife of Harry Kaiser) and one John White "also known as John Doe," were indicted for "knowingly and unlawfully" possessing "divers papers, documents, slips and memoranda pertaining to the business of lottery and lottery policy, * * * contrary to the provisions of N. J. S. 2A:121-3(b)"; and for conspiring "to knowingly possess papers, documents, slips and memorandum that pertain to the business of lottery * * * contrary to the provisions of N. J. S. 2A:98-1 and N. J. S. 2A:98-2."

As far as the record before us reveals, White was not apprehended by the police and, on May 15, 1961, the opening day of the trial under the aforesaid indictments; a severance was granted as to him on the application of the State. The indictments as to the remaining defendants were "consolidated for the purpose of trial." The jury

returned a verdict acquitting defendant Edna Kaiser under the two indictments against her, and convicting appellants on each of the four indictments aforesaid.

On this appeal appellants urge several grounds for reversal of their convictions. They are that (a) defendant's motion for judgment at the close of the State's case (*R. R.* 3:7-6) with reference to the indictments charging maintenance of a nuisance and possession of lottery papers should have been granted; (b) although no motion was made at the end of the State's case with reference to the remaining two indictments, appellants contend that the State "failed to prove the basic elements of both of these offenses," and we should recognize such failure under the plan error rule (*R. R.* 1:5-1(*a*), 2:5); (c) the "verdicts were contaminated by the unwholesome demeanor of Susan Kaiser," hereinafter more particularly described; (d) Susan Kaiser was denied "due process of law," in violation of "Art. 1, Sec. 1" of the Constitution of this State and "the first section of the Fourteenth Amendment to the Constitution of the United States," by "unfairly and improperly" compelling her to stand trial, and by the trial court's action in that regard, allegedly based in part on "matters dehors the record"; and (e) that the trial court failed "to instruct the jury on all the essential questions of law involved in the case."

Resolution of the points raised by this appeal requires a detailed recital of the facts.

On May 12, 1961 defense counsel moved that the case against Susan Kaiser (age 63) be continued "until such time as her condition improves enabling her to withstand the rigors of trial." In support of his motion counsel relied upon the reports of Dr. Solomon Hirsch and Dr. Raphael Gilady, the physician for the County of Bergen. The latter had examined appellant pursuant to court order.

Dr. Hirsch's report, dated April 10, 1961, was as follows:

Appendix A.

"Mrs. Susan Kaiser is under medical care for a chronic Pulmonary Emphysema. Because of a superimposed respiratory infection it is dangerous at present to expose her to the elements, or to any stresses and strains such as are encountered in court procedures."

Dr. Gilady's report, dated April 13, 1961 (after reciting in detail the extent of his physical examination of Susan Kaiser on that day, preceded by an outline of her family history and a statement of her complaints), contained his detailed findings, including the following:

"* * * Pulse regular, rate 80, small; * * * Heart—the sounds * * * of fair muscular quality * * * no murmurs; * * * evidence of left ventricular hypertrophy; * * * Lungs—showers of moist rales posteriorly in both lungs from the lower margin of the scapula to the base. The breath sounds, therefore, in that area are impaired. Anteriorly the breath sounds are bronchovesicular and no rales elicted. The costophrenic angles are clear on the right, cloudy on the left: * * * Liver, Gall Bladder, Stomach, Spleen, and Kidneys are not palpable; * * * Muscular System fair. Nervous System intact; Reflexes all hyperactive, nonpathological; * * * Blood Pressure —150/90."

He described his X-ray findings as follows:

"Both pulmonic fields show severely increased lung markings of vessels and bronchi, especially in the bases. In the left lower lobe and costophrenic angles there is total density indicating thickened pleura and fibrosis of the lung. The right costophrenic angle is normal. Heart shows a degree of left ventricular enlargement and an obliterated cardiophrenic angle probably due to bronchiectasis."

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Most of the conditions revealed by the electrocardiographic examination were characterized in the report as normal, but certain others lead to Dr. Gilady's conclusion hereinafter set forth.

Additional findings were:

> "Blood Count * * * perfectly normal; * * * Urine Examination * * * normal; * * * Blood Chemistry, Serum Cholesterol is elevated to 305 milligrams. (The normal is between 150 to 250 milligrams.)"

Dr. Gilady's conclusions were as follows:

> "This woman is suffering from acute pulmonary disease super-imposed on chronic emphysema and early bronchiectasis.
>
> She also has a hypercholesteremia. (High serum cholesterol in the blood.)
>
> The electrocardiogram shows definite evidence of myocardial (heart muscle) insufficiency.
>
> She also has a mild hypertension. (Elevation of blood pressure.)
>
> All the above indicates that she is chronically ill and there is no question that the ordeal of the prolonged court procedure would be deleterious to her health. She should particularly not be allowed to come out in inclement weather, because of the acute lung involvement. (The wet lungs—the moist rales in the bases of both lungs.)"

The trial court, after viewing the medical reports and after stressing the many phases of Dr. Gilady's detailed examination which revealed normal physical conditions, concluded that defendant was able to stand trial and denied defendant's application for a continuance. In doing so it stated:

> "Under this diagnosis and conclusion if the court were to grant your request, this defendant would

> never be able to stand trial for the charges against her and the conclusion in the last paragraph is very interesting. She is chronically ill and there is no question that the ordeal of a prolonged court procedure would be deleterious to her health."

The Court added that, upon receiving Dr. Gilady's report, it had asked him what he meant by a "long protracted trial," and that Dr. Gilady's response was, "A case that would take three or four or five or six weeks." The record shows that the trial occupied four court days.

On the morning of May 15 the trial commenced as stated, and after approximately one hour had elapsed and during the empaneling of the jury, Susan Kaiser fainted. A Dr. Laytham was summoned and examined her. Upon the conclusion of his examination of defendant he was questioned by the court at side-bar. Defense counsel objected to this procedure and the trial court thereupon permitted counsel to be present but refused to permit him to then question the doctor. At the conclusion of the side-bar conference the judge, addressing himself to the prosecutor and to defendants' counsel, recited his recollection of the substance of his conversation with Dr. Laytham for the record as follows:

> "I asked the doctor what her [Susan Kaiser's] blood pressure was. He said it was normal for a woman of her age and that she is nervous and blue as a result of excitement. Her lungs cannot accept and take in the amount of oxygen in the room."

The judge added:

> "* * * I have made arrangements to absolutely cool off this room beyond reason.
>
> I am going to say to you [defendant's counsel] for your client[s] that if she feels she cannot continue, to advise the court, and we will cease so that she can regain her composure."

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Defendant's counsel responded by moving for a mistrial on the basis that Susan Kaiser did not have the ability to defend herself. The following colloquy ensued:

> **"I have made a motion previously asking this court for a continuance in this case and I think I was correct when I made the motion. I am convinced now.**
>
> **The Court: I am also convinced that I was correct when I denied your motion, Mr. Lucchi, and I say that this woman—I feel sorry for her condition under the circumstances—but under your premise now she could never be brought to trial. Her condition is chronic. I don't believe that is the manner of conducting our criminal laws in New Jersey. I feel so sorry for her, but her blood pressure is normal. Her heart beat is normal. She had this condition where excitement makes it impossible for her to get her full amount of oxygen.**
>
> **Mr. Lucchi: And when she doesn't get that oxygen, your Honor please, from the air, how is she going to confer with me?**
>
> **The Court: We will stop the proceedings and she may then be able to confer with you.**
>
> **Is that satisfactory?**
>
> **Mr. Lucchi: No, sir. It is not.**
>
> **The Court: Both your motions are denied. Call the jury back."**

The State's proofs revealed that about 7 P. M. on July 14, 1960 a police raid was conducted on the premises at 53 Forest Street, North Arlington. The premises were owned by Susan and Harry Kaiser. The former made her home at that address.

State Trooper Kolodzieski testified that the several officers who participated in the raid were in possession of "a warrant to search the premises for suspicion of illegal lottery." Upon arriving at the Kaiser house the front

door bell was rung. Receiving no response the officers forced the front door open and Kolodzieski and a fellow officer entered the house. Kolodzieski testified that he saw two persons whom he identified as appellants, walking in a "little hallway * * * in the center of the home * * * from the direction of the kitchen." He testified that he told appellants that "We were members of the New Jersey State Police" and that he also told them that the police possessed a search warrant. Kolodzieski testified that he then went into the kitchen where he found "Edna Kaiser standing at the kitchen table." The witness stated that he there saw "adding machines on the table" in addition to "white envelopes containing white slips of paper with numbers notations on them and another adding machine * * * on the kitchen counter."

After a search of the cellar and first floor of the house, consisting principally of a bedroom, living room, dining room and kitchen, to ascertain whether any other person was present, the witness proceeded to the second floor to search the two bedrooms located there. In one of the upstairs bedrooms was a small table with a telephone and adding machine upon it. Also in the bottom drawer of a chest of drawers were found "bundles of one-dollar bills," totalling $3,650. The trooper testified that when he started to count the money Harry Kaiser told him that each bundle contained $50 and that he knew the bundles were of that amount because he had "helped count them and package them."

A closet in the bedroom was searched and found to contain "about twenty empty paper bags" and "sixteen or seventeen canvas money-bags," and a strong box in which the sum of approximately $265,000 was found. Appellants, on being interrogated by the officers, denied any prior knowledge of the strong box. State Trooper Michael Beckish, who assisted in the raid and was present at the counting of the money which was confiscated by the officers, testified that "there was a grand total of $275,841.85 found in the house."

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State Trooper Paul A. Geczy was assigned "to conduct a search of the kitchen, dining room and pantry of the first floor." He testified:

> "* * * In the kitchen I found a large quantity of white envelopes bearing numbers slips, three adding machines, a radio, and in the pantry we found two pink plastic waste baskets containing envelopes and adding machine tapes, money wrappers, and we conducted a search of the dining room and we found a quantity of money in the cedar chest and in a china closet in the dining room."

The trooper further testified that 216 of the aforesaid "white envelopes" were found, "containing thousands and thousands of numbers plays, numbers slips, with plays on them * * *." He further said that "the total amount of the bets ran over $12,000.00 for * * * July 14, 1960," the date endorsed on the slips he identified. Other slips, memoranda and records found in the Kaiser home and admitted into evidence were identified by various witnesses as gambling data bearing various dates including "July 12, 13 and 14."

State Trooper Gordon R. Hector participated in the raid and "was detailed to take photographs." Several of the photographs were admitted in evidence and form part of the record on appeal. They depict the rooms in the house and the various items found therein by Troopers Kolodzieski and Geczy as aforesaid.

The record further reveals that, with reference to the results of the search, Trooper Geczy further testified that he "had previous experience with gambling investigations," and that he examined the "thousands and thousands" of slips of paper found in the house "and determined that they were numbers bets."

Walter Spahr, lieutenant of detectives in the Bergen County Prosecutor's office, testified that he had conducted over 1,000 gambling investigations. Based upon the materials found in defendants' house, the witness stated:

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"From what is presented there I would say it would be a tally or a counting house, more commonly known as a numbers bank.

The fact that the money and the slips are there would alone, in itself, constitute it as being a bank.

* * * * * * *

Each item in itself is a bit of gambling paraphernalia, but together it is gambling paraphernalia all coordinated into one."

The remaining witness called on behalf of the State was Arthur Rosenthal, who was engaged in the business of selling store and office equipment. He identified one of the adding machines found in defendants' house as one he had loaned to Harry Kaiser. He explained that the machine in question had been loaned to Harry Kaiser while a defective machine which the latter had recently purchased was being repaired.

Defendants denied any participation in the lottery business. According to defendants' testimony, Harry and Edna Kaiser were merely visiting Susan Kaiser at the time of the raid. Appellant Susan Kaiser testified that in March 1960 she rented one of the upstairs bedrooms to a man named White, who had identified himself as a friend of her deceased husband. She claimed that the lottery paraphernalia belonged to White; that she suspected he was gambling; that she told him so "about a month * * * before the raid"; that he said that "he was gambling but he would get out"; and that "many times" she asked him "to please go before [she] got in trouble." She testified that she had not revealed this information to either Harry or Edna Kaiser. She also stated that the day of the raid was the first time White had done "any work" on the first floor. She maintained that she had not cleaned the rented room during the entire "tenancy" and testified that White "cleaned" it; that no one had cleaned the other upstairs room; and in fact that she "never went upstairs." Her

explanation of the presence of the adding machine which Harry Kaiser had borrowed from Arthur Rosenthal was that White asked her to borrow such a machine for him and that she requested the loan thereof from her son. She acknowledged that such request was subsequent to the date when she had "told [White] to leave." She testified that the money found downstairs, approximately $6500, belonged to her.

It was established on cross-examination of Susan Kaiser that, despite the fact that she claimed that she never used the second floor, she had a telephone installed on that floor "about two years ago, maybe more." She admitted that White used the upstairs telephone and paid her "$20.00 each month towards the telephone bill."

In rebuttal of Susan Kaiser's assertion that no one cleaned the unused upstairs room, the State called Trooper Geczy who testified that on the night of the raid, "it was clean and neat and in good order. I would say it was immaculate."

As far as the record discloses, Susan Kaiser experienced no physical discomfort during the course of her direct examination. During cross-examination, however, she made several complaints. While being interrogated concerning the cleaning of the rooms on the second floor of her home she complained of feeling ill. The court excused the jurors and after they left the room the defendant fainted. A recess was taken, followed by a resumption of her cross-examination.

A short time thereafter Susan Kaiser again complained of feeling ill and stated that, "I can't get my mind." After a side-bar discussion, the nature of which is not revealed by the record before us, her examination resumed. Shortly thereafter and before the court adjourned for the day the trial judge answered negatively an inquiry from Susan Kaiser as to whether her interrogation would continue much longer. However, after several more questions were propounded under cross-examination, the witness complained that she did not "know what she was talking about."

In response to the court's inquiry she stated that she was "just in a fog since [she] got sick this time," but that "prior" to that time she was "all right." Court was then adjourned for the day.

When court reconvened the following morning the prosecutor in the presence of the jury read aloud the transcript of Susan Kaiser's cross-examination from the point where she had fainted on the previous day. This was done, as expressly stated by the prosecutor in open court, because of Susan Kaiser's aforesaid earlier statement that she was unable to comprehend what she was "talking about." At the conclusion of the reading no attempt was made by the defense to correct any of her previous answers and her testimony remained unchanged.

Cross-examination of Susan Kaiser was then resumed and a complaint that she did not feel "too good" was made by the witness when the prosecutor during the cross-examination inquired as to how she felt. The State suggested a recess, which was granted, and thereafter the cross-examination was continued and concluded.

During redirect examination of Susan Kaiser the transcript of her testimony previously read by the prosecutor as aforesaid was offered in evidence *by her counsel* and received and marked as an exhibit "on behalf of the defendant."

Harry Kaiser testified that, although he visited his mother "two or three times a day," he "never" saw White. He denied the trooper's testimony that he had counted certain of the "bundles" of money to which reference has heretofore been made.

We perceive no necessity for making any detailed reference to his other testimony, dealing with a variety of collateral matters, or to recite the testimony of other witnesses produced by defendant, as no contention that the verdict was against the weight of the evidence is made. We consider appellants' grounds of appeal in the order hereinabove set forth.

Appendix A.

I AND II.

[1] We find no merit in defendants' contention that the court erroneously denied their motion for a judgment of acquittal at the end of the State's case (*R. R.* 3:7-6). On such a motion the court was obliged "to view the State's evidence in its entirety, giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom." *State v. Fiorello*, 36 *N. J.* 80, 90 (1961). It is not required that the State's proofs exclude "every reasonable hypothesis except that of guilt." *State v. Graziani*, 66 *N. J. Super.* 1, 13 (*App. Div.* 1959), affirmed 31 *N. J.* 538 (1960), *cert.* den. 363 *U. S.* 830, 80 *S. Ct.* 1601, 4 *L. Ed. 2d* 1524 (1960), cited with approval in *Fiorello*, at *p.* 90.

The aforesaid proofs adduced by the State in the case at bar amply support the trial court's action in denying defendants' motion for judgment of acquittal and also make clear that no justification exists for invoking the plain error rule, urged as aforesaid by defendants with reference to the other indictments as to which no such motion was made.

III.

[2] We determine that the contention of counsel for Susan Kaiser that his client's "demeanor" was "unwholesome" and "contaminated" the verdict is devoid of merit. He seeks to support his argument that her own actions justify a reversal of her conviction by presenting the following rhetorical question in his brief:

> "How were the jurors to evaluate the fainting spells or the illness of the defendant, when the very action of the trial court in proceeding with the trial after each of the incidents, conveyed to them an impression that the court did not believe that the defendant, Susan Kaiser, was really ill, but rather faking or malingering?"

We find no need to discuss the possible ramifications of sustaining such a contention. Suffice it to say we reject it as a reason for reversal in the instant case.

IV.

Susan Kaiser's assertion that she was denied due process of law is predicated upon the state of her health. It is her contention, as stated in defendants' brief, that the "paramount question" is "whether her health was immediately affected to the degree that her perception and awareness of current events were dulled so that her ability to participate in the presentation of her defense was impaired."

[3] The test of one's ability to stand trial was established by the United States Supreme Court in *Dusky v. U. S.*, 362 *U. S.* 402, 80 *S. Ct.* 788, 4 *L. Ed. 2d* 824, 825 (1960). The test there enunciated was as follows:

> "* * * We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"

[4] The question of whether or not an accused should be granted a continuance is a matter within the discretion of the trial court. Annotation: "Continuance of criminal case because of illness of accused," 66 *A. L. R. 2d* 232, 235 (1959); 22A *C. J. S. Criminal Law* 485, at *p.* 99. The above cited authorities recognize that several factors may be evaluated by the trial court in reaching its determination. Among those factors deserving consideration by the court

in the exercise of its discretion are medical reports, personal observation of the accused, the effect of a continuance upon the State's ability to produce evidence at a subsequent date, and whether or not the accused will be better able to stand trial at a later time. Of importance to an appellate court, in addition to the above mentioned factors of which a trial court may take cognizance, are the clarity of the accused's testimony at trial and the conduct of the trial court in granting defendant periods of rest whenever the same were requested. *State v. Pierce*, 175 *Wash.* 523, 27 *P.* 2*d* 1087, 1088 (*Sup. Ct.* 1933).

[5] We find that the trial court did not abuse its discretion in denying defendant's motion for a continuance. The court had for its consideration the medical report of Dr. Gi'ady and the opportunity to observe Susan Kaiser. The record reveals that during the course of the entire proceedings the court was sympathetic with the defendant's disability and considerate of her needs. At no time during the course of the trial did the defense request a recess in order to confer with Susan Kaiser or to afford her a short period of rest. Moreover, a reading of her testimony reveals that the defendant possessed an acute awareness and a "rational as well as factual understanding of the proceedings" against her. *Dusky v. U. S., supra.* Her answers were clear in expression and responsive to interrogation.

It is noted that the aforesaid medical report of Dr. Hirsch, produced by Susan Kaiser on her application for a continuance, was extremely brief and couched in general terms. Furthermore, the record shows that appellant's counsel expressly rejected the court's aforesaid offer on the opening day of the trial to recess the proceedings at any time to permit her to confer with her counsel. Moreover, at no time during the trial did she submit any medical evidence that she was physically unable to proceed.

In addition to her contention that the trial court's decision not to grant a continuance was factually unjustified,

defendant claims that it amounted to an abuse of discretion for two additional reasons, *viz.*, because matters outside the record were considered by the court, and because the denial of the motion for a continuance was assertively based upon the trial court's alleged fear that Susan Kaiser would never be physically fit to stand trial.

The first reason stems from the trial court's out-of-court conversation with Dr. Gilady, after receiving his medical report, and the refusal to permit oral interrogation of Dr. Laytham after he had examined Susan Kaiser. In support of her contention defendant relies upon two cases involving findings by administrative tribunals, based upon matters outside the record relative to the merits of the substantive issues with reference to which the tribunals were there concerned. *Elizabeth Federal Savings & Loan Ass'n v. Howell*, 24 *N. J.* 488, 506 (1957); *Mazza v. Cavicchia*, 15 *N. J.* 498, 514 (1954). They are inapposite. They are completely unrelated to the matter with which we are here concerned—whether the trial court abused its discretion in denying Susan Kaiser's application for a continuance of the trial and rejecting her later motion for a mistrial. Under the facts here present we determine that the defendant was not prejudiced by the procedure followed. For the record the court stated its recollection of its conversations with Dr. Laytham and Dr. Gilady. See *Shaneyfelt v. State*, 40 *Ala. App.* 13, 109 *So. 2d* 146 (*Ct. App.* 1958). Defendant's counsel neither objected to Dr. Gilady's oral clarification of his written report, nor did counsel request that he be permitted to examine that doctor. Furthermore, although defendant's counsel requested an opportunity to examine Dr. Laytham, he registered no objection to the court's oral statement of its recollection of Dr. Laytham's findings as expressed by that doctor at the aforesaid side-bar conference at which defendant's counsel was present.

[6] In support of her claim that the trial court's denial of a continuance of the trial was "motivated by over-zealousness to move" the trial as scheduled, appellant cites *Amo v.*

Genovese, 17 *N. J. Super.* 109 (*App. Div.* 1951), certif. den. 9 *N. J.* 181 (1952), and *Pepe v. Urban*, 11 *N. J. Super.* 385 (*App. Div.* 1951), certif. den. 7 *N. J.* 80 (1951). Both cases hold that it is an abuse of discretion to refuse a continuance solely on the basis of expediting the business of the court. As hereinbefore indicated, however, the prospect of an improved ability of the accused to stand trial in the future may properly be considered by the trial court along with other relevant factors. Annotation, 66 *A. L. R.* 2*d*, *supra*, at *p.* 241; 22A *C. J. S.*, *supra*, at *p.* 102. We find no indication in the record that the court accorded a disproportionate amount of weight to that consideration.

[7, 8] Appellant Susan Kaiser also claims prejudicial action by the trial court in permitting the prosecutor to read the transcribed portion of her testimony as above stated. We find no error in such action. Initially we observe that defendant interposed no objection to such reading. More importantly, as hereinabove noted, after the prosecutor had read the transcript, appellant's own counsel offered it in evidence and on her application it was received as an exhibit. She may not now complain. "Where an allegedly aggrieved party not only does not object at trial but by his own conduct endorses the action taken, he may not be heard on appeal to label that action as 'plain error.' *Schult v. H. & C. Realty Corp.*, 53 *N. J. Super.* 128, 136 (*App. Div.* 1958), *certif. den.* 29 *N. J.* 279 (1959)." *Venuto v. Lubik Oldsmobile, Inc.*, 70 *N. J. Super.* 221, 229 (*App. Div.* 1961).

V.

Our examination of the charge of the trial court reveals no basis for appellants' contention that the court's charge was inadequate.

The record before us discloses ample justification for the jury's verdict as rendered.

The conviction of appellants is affirmed.

APPENDIX B.

Opinion of Superior Court of New Jersey, Appellate Division on Judgment Affirming the Denial by Bergen County Court, Law Division of Petitioners' Motions to Vacate the Judgments of Convictions and for a New Trial, One of the Judgments Here Sought to Be Reviewed.

ARGUED June 10, 1963—Decided July 17, 1963 Before JUDGES GOLDMAN, FREUND and FOLEY.

The opinion of the court was delivered by

FOLEY, J. A. D. This is an appeal from an order of the Bergen County Court, Law Division, denying defendants' motions to vacate the judgments of conviction theretofore entered and for a new trial.

Defendants were arrested on July 14, 1960 as a result of a police raid conducted on their premises at 53 Forest Street, North Arlington. The search and ensuing seizure of evidence resulted from the execution of a search warrant obtained from the Superior Court, Law Division, on July 14, upon a verified application of Detective Robert W. Green. Respondent State concedes that the application "falls short of the standards recently enunciated by our Supreme Court."

Defendants were indicted by the Bergen County Grand Jury on four counts charging violations of *N. J. S.* 2A:98-1 and 2A:98-2 (conspiracy), 2A:130-3 (maintaining a nuisance), 2A:121-3 (permitting a lottery on the premises), and 2A:121-3(b) (knowing possession of papers pertaining to a lottery). The trial began on May 15, 1961 and ended with defendants' conviction on May 18. The facts in the case are reported in *State v. Kaiser*, 74 *N. J. Super.* 257 (*App. Div.* 1962). Mention is made of the raid and the warrant at *pages* 264-266, of 74 *N. J. Super.*

On June 19, 1961 the Supreme Court of the United States decided *Mapp v. Ohio*, 367 *U. S.* 643, 81 *S. Ct.* 1684, 6 *L. Ed.* 2*d* 1081 (1961).

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On June 23 defendants were sentenced. In arguing an application for a stay of execution pending appeal, defendants' then counsel Abraham Slurzberg, Esq. raised the *Mapp* issue and indicated that he believed *Mapp* should be given retroactive application.

Thereafter, defendants appealed to this court. On November 6, 1961 *State v. Valentin*, 36 N. J. 41 (1961), was decided. In that case, during a pre-*Mapp* prosecution for carrying a concealed weapon without a permit, defendant made a motion to suppress evidence on the grounds of illegal search and seizure. The motion was denied and the Appellate Division affirmed. The Supreme Court granted leave to appeal, and before argument *Mapp*, *supra*, was decided. The Supreme Court remanded the case so that evidence could be taken on the issue of the legality of the search and seizure.

Defendants' appeal was argued before this court on February 26, 1962. At that time they did not raise *Mapp* nor did they challenge the search, seizure, or the introduction of evidence at the trial. We affirmed the convictions on May 14, 1962. *State v. Kaiser*, *supra*.

On June 4, 1962 our Supreme Court in *State v. Smith*, 37 *N. J.* 481, 488-489 (1962), held, *inter alia*, that *Mapp*, *supra*, had retroactive effect on searches antedating it, and that the court would decide the *Mapp* issue on direct appeal from a pre-*Mapp* conviction in cases in which the record suggested a basis for questioning the reasonableness of the search.

On June 25, 1962 defendants filed a petition for certification with the Supreme Court. Again they did not challenge the search and seizure or the admission into evidence of the fruits thereof. The Supreme Court denied certification. 38 *N. J.* 310 (1962).

Defendants then moved for an order vacating the judgments of conviction, and for a new trial based on the illegal seizure of the "proofs upon which the conviction was based," and the insufficiency of the application upon which

the search warrant was issued. The motion was denied and defendants appeal.

R. R. 3:7-11(a) provides:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made at any time, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 10 days after verdict or finding of guilty, or within such further time as the court may fix during the 10-day period."

[1] Since the motion under consideration was not made by defendants within ten days of the finding of guilty, and since there has been no remand to the trial court, defendants must rely on "newly discovered evidence" for application of this rule. But a change in the law by judicial decision subsequent to trial does not constitute newly discovered evidence—in fact, the judicial decision is not "evidence" at all. *Cf. Miller v. McCutcheon*, 117 *N. J. Eq.* 123, 129, 95 *A. L. R.* 702 (*E. & A.* 1934), *Lockwood v. Walsh*, 137 *N. J. Eq.* 445, 451-452 (*Prerog.* 1946). Compare also *Yonadi v. Homestead Country Homes, Inc.*, 42 *N. J. Super.* 521, 528-529 (*App. Div.* 1956), where the question was presented but not decided.

[2] No doubt the problem presented is best considered as an attempt to seek the court's aid under *R. R.* 3:11-9, which provides:

> "If no procedure is specifically prescribed, the courts exercising criminal jurisdiction may proceed

in any lawful manner not inconsistent with the Constitution, these rules or with any applicable statute."

Thus, precise rule or express provision being absent, relief will not be prevented where constitutional rights have been violated. *Cf. Janiec v. McCorkle*, 52 *N. J. Super.* 1, 19-20 (*App. Div.* 1958)

[3] It is doubtful that a writ of *habeas corpus* would have afforded defendants a procedural channel to attack their convictions. *Habeas corpus* is a remedy based on the limited ground that the trial court lacked jurisdiction and the conviction was therefore void. *State v. Cynkowski*, 10 *N. J.* 571, 576 (1952). It is true that *Cynkowski*, in an effort to accommodate common law remedies to the correction of instances of "fundamental unfairness" violative of due process, has extended *habeas corpus* relief to embrace the concept of jurisdictional deficiency, where a defendant was not afforded opportunity for a fair trial, or his plea was entered under circumstances which rendered its acceptance "fundamentally unfair and shocking to a sense of justice." 10 *N. J.*, at *p.* 576. Yet, our courts have continued to view jurisdiction in its traditional sense. If a conviction is jurisdictionally baseless whether because of a violation of fundamental fairness under the due process clause or for some other reason, defendant is still entitled to release. For a full discussion of the existing and proposed post-conviction remedies in New Jersey, see *Report of Supreme Court Committee on Post-Conviction Rights of Indigents*, 85 *N. J. L. J.* 557 (1962).

The main argument of the State places the issue in a broader context. The State maintains that a pre *Mapp* conviction involving the introduction of illegally seized evidence may not be attacked *collaterally* no matter what procedure is used. The State's position is supported by recent decisions in foreign jurisdictions. Thus, in *Petition of Dirring*, 183 N. E. 2*d* 300, 301 (1962) (where petitioner

had been convicted pre-*Mapp* (1959)) the Supreme Judicial Court of Massachusetts held proper a denial of *habeas corpus* on the ground that the issue of illegal search was not brought before the court "by an appropriate appellate procedure * * * following the trial of the indictments."

In *Commonwealth ex rel. Stoner v. Myers*, 199 *Pa. Super.* 341, 185 *A. 2d* 806 (*Super. Ct.* 1962), the Pennsylvania court, while indicating that there was no illegal search and seizure, and that *Mapp* was prospective in operation, went on to say that "convictions which have been unappealed and have become final should not ordinarily be subject to collateral attack by habeas corpus on the ground that evidence alleged to have been illegally received was used at the trial." *Id.*, at *p.* 808.

Persuasive reasoning rejecting a collateral attack is set forth in the concurring opinion of Justice Traynor in *In re Harris*, 56 *Cal. 2d* 879, 16 *Cal. Rptr.* 889, 366 *P. 2d* 305 (*Sup. Ct.* 1961). After recognizing that *Mapp* elevated the right to exclusion of illegally seized evidence to constitutional eminence, Judge Traynor said at *p.* 892 of 16 *Cal. Rptr.*, at *p.* 308 of 366 *P. 2d*:

> "If the violation of a petitioner's constitutional rights by the use of illegally seized evidence had any bearing on the issue of his guilt, there should be no doubt that habeas corpus would be available. Unlike the denial of the right to counsel, the knowing use of perjured testimony or suppression of evidence, the use of an involuntary confession, or * * * the denial of an opportunity to present a defense, the use of illegally seized evidence carries with it no risk of convicting an innocent person. The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but 'to deter unconstitutional methods of law enforcement.'"

Compare *State v. Smith*, *supra*, where our Supreme Court stated:

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> "We are not dealing with a denial of a right which bears upon the truth of a conviction, as for example, the right to counsel or to appellate review. * * * Rather the subject is evidence, the probative force of which is constant whether it is seized with or without warrant. * * * In short, the fairness of the trial itself and the truth of the verdict are not involved. The constitutional injury lies elsewhere." 37 *N. J.*, at *pp.* 484-485.

Of course California decisions are not entirely apposite since California enforced the exclusionary rule prior to *Mapp*. Therefore, a person aggrieved had the opportunity to raise illegal search and seizure by direct attack at his trial. See, for example, *People v. Simon*, 45 *Cal. 2d* 645, 290 *P. 2d* 531 (*Sup. Ct.* 1955).

Recently the Fourth Circuit Court of Appeals held that a federal writ of *habeas corpus* would issue where illegally seized evidence was used in a trial resulting in petitioner's state conviction for murder. The conviction was affirmed prior to *Mapp* by the state's highest court. *Certiorari* had been denied by the Supreme Court, 368 *U. S.* 867, 82 *S. Ct.* 7, 7 *L. Ed. 2d* 65, subsequent to *Mapp*, where defendant neither objected to the introduction of the illegally seized evidence at trial nor questioned its admissibility in state court appeals. *Hall v. Warden, Maryland Penitentiary*, 313 *F. 2d* 483 (4 *Cir.* 1963).

However, in *Gaitan v. United States*, 295 *F. 2d* 277 (10 *Cir.* 1961), *cert.* denied 369 *U. S.* 857, 82 *S. Ct.* 939, 8 *L. Ed. 2d* 15 (1962), evidence illegally seized by state authorities was the basis of defendant's conviction of a federal offense prior to both *Elkins v. United States*, 364 *U. S.* 206, 80 *S. Ct.* 1437, 4 *L. Ed. 2d* 1669 (1960) (holding that evidence seized illegally by state authorities must be excluded in a federal criminal trial), and *Mapp*. A motion to suppress the evidence was denied, and appeals had been taken unsuccessfully prior to *Elkins* and *Mapp*. After *Elkins* and *Mapp* were

decided, defendants moved to vacate the sentence. The Tenth Circuit Court of Appeals held that denial of the motion was proper on the grounds of *res judicata*, since the issue had been raised and decided at the original proceedings.

State v. Smith, supra, 37 *N. J.* at *pp.* 483-489, while not setting the outer limits of retrospectivity, did hold that *Mapp* applied to illegal searches antedating *Mapp*. While not deciding whether collateral attack would be allowed, *Smith* also indicated that failure to object at a pre-*Mapp* trial did not constitute waiver.

We believe that a collateral attack should not be allowed here for the reasons given by Judge Traynor in ***In re Harris, supra.***

[4] Even were we to assume that collateral attacks may be had on pre-*Mapp* searches where the trial and appellate proceedings were completed prior to *Mapp*, on the grounds that the defendant and his counsel could not know their objections would succeed, must we allow a collateral attack to appellants, where the conviction preceded, but the appellate proceedings postdated *Mapp*? In *Mapp* itself, Justice Clark speaking for the majority, stated:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." *367 U. S.* 659, *fn.* 9, 81 *S. Ct.* 1693

It is well settled in New Jersey that collateral attack is not designed to serve the office of an appeal. *See In re Rabilotto*, 24 *N. J. Super.* 209, 211-212 (*App. Div.* 1953).

In federal courts illegal search and seizure involved in federal convictions where, of course, the right and remedy of exclusion was available at the trial and was known or should have been known by defendant's counsel, *have not been subject* to collateral attack. *See Jones v. Attorney*

General of the United States, 278 *F. 2d* 699, 701 (8 *Cir.* 1960).

[5] It is true that in the present case defendants could not have known of *Mapp* at the trial. But *Mapp* was decided prior to appeal and we have proof certain that defendants' counsel knew of its existence at the time the appeal was taken. *State v. Valentin*, *supra*, applied *Mapp* to a pre-*Mapp* search. This decision was also in existence prior to the appeal. Finally, *State v. Smith*, *supra*, was decided prior to defendants' petition for certification to the Supreme Court. Yet, the issue was not raised. Defendants had ample opportunity to attack their conviction directly. They did not do so, and they will not be permitted now to attack it collaterally.

Affirm.

APPENDIX C.

Opinion of Bergen County Court, Law Division, on Order Denying Motions of Petitioners to Vacate the Judgments of Convictions and for a New Trial.

Decided November 9, 1962.

Before: Honorable Benjamin P. Galanti, *J. C. C.*

Appearances: Guy W. Calissi, Esq., Prosecutor, by William Brudnick, Esq., Assistant Prosecutor. Irving J. Vogelman, Esq., for defendants.

This matter comes before me on an application for an order vacating the judgment of conviction heretofore entered in this matter on the 23rd day of June, 1961, convicting the defendant, Harry Kaiser, of violations of N. J. S. 2A:98-1, N. J. S. 2A:98-2, N. J. S. 2A:130-3, N. J. S. 2A:121-3 (c), and N. J. S. 2A:121-3 (b) and sentencing him to imprisonment for a term of not less than two nor more than three years on each indictment, sentences to run concurrently, and convicting the defendant, Susan Kaiser, of violations of N. J. S. 2A:98-1, N. J. S. 2A:98-2, N. J. S. 2A:130-3, N. J. S. 2A:121-3 (c) and N. J. S. 2A:121-3 (b) and sentencing her to imprisonment for an indeterminate term on each indictment, sentences to run concurrently, and for an order granting a new trial for the reasons that:

1. The proof upon which the convictions were based was illegally obtained, and improperly admitted into evidence, as the result of an illegal search and seizure in violation of the 4th and 14th amendments to the Constitution of the United States and paragraph 7, Article 1 of the 1947 New Jersey Constitution.

2. That the affidavit upon which the search warrant was issued was legally defective and contained insufficient facts upon which to base a finding of probable cause.

And, on further application for an order granting a stay of execution of the sentences until final disposition of this matter and for an order permitting continuance of bail until final disposition of this matter, and for such other relief as the court may deem just and proper.

The conviction of both defendants was affirmed by the Appellate Division in a decision dated May 14th, 1962 and reported in 74 N. J. S. 257.

On Petition for Certification to the Supreme Court, Petition for Certification was denied by the Supreme Court on September 17, 1962 and reported in 38 N. J. 310.

A copy of the affidavit which was the basis for the issuance of a search warrant reads as follows:

"APPLICATION FOR SEARCH WARRANT

STATE OF NEW JERSEY, }
COUNTY OF BERGEN. } ss.;

On this 14th day of July, 1960, before me, the undersigned Judge of the Superior Court of the State of New Jersey, personally appeared Detective Robert W. Green of the New Jersey State Police, who, being duly sworn on his oath according to law, deposes and says:

1. I reside at New Jersey State Police Headquarters, in the Township of Ewing, County of Mercer, State of New Jersey.

2. I have good reason to believe, and do believe, that in and upon certain premises within the Borough of North Arlington, County of Bergen, State of New Jersey, to wit: premises known as 53 Forest Street, and more particularly described as follows: a one-story brick house with attached garage, occupied by and under the control of unknown persons, there have been and now are being conducted the illegal practice commonly known as bookmaking

and maintaining a lottery in violation of the laws of the State of New Jersey, to wit: N. J. S. 2A:112-3 and N. J. S. 2A:121-3.

3. That the facts tending to establish the grounds for this application, and the probable cause of the deponent's belief that such grounds exist are so follows: Information given to the deponent to the effect that bookmaking and a lottery are being conducted within the above-described premises.

4. WHEREFORE, I respectfully move that a search warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

Sworn and subscribed to before me
this 14th day of July, 1960.

VICTOR S. KILKENNY,
Judge of the Superior Court.

ROBERT W. GREEN,
Detective Robert W. Green".

A review of the case law leading up to *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684; 6 L. Ed. 2d 1081, would not be amiss at this time.

Of course, the Fourth Amendment to the Constitution of the United States constitutes a sweeping grant of protection against unreasonable searches and seizures. But, it does not provide in express language that evidence obtained in the course of an unlawful search and seizure shall be inadmissible in the trial of a criminal case. In *Weeks* vs. *United States* (decided Feb. 24, 1914), 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, it was held that evidence obtained by Federal officers in the course of an illegal search and seizure is not admissible in evidence in a

criminal case in the United States Court. That determination did not derive from the explicit requirements of the Amendment. It was based upon judicial implication, and it has been reiterated time and time again. In *Byars* vs. *United States* (decided Jan. 23, 1927), 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520, it was held that where an illegal search and seizure is in effect, a joint operation of local and federal officers, the evidence obtained must be excluded in the trial of a criminal case in the United States Courts; and that rule was reiterated in *Lustig* v. *United States* (decided June 27, 1949), 338 U. S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819.

At the time of the trial in the instant case, it was and had been for a long time the settled rule that evidence obtained through a wrongful search and seizure by state or municipal officers, acting independently of the federal government and not solely for the purpose of aiding in the enforcement of federal law, was admissible in a criminal prosecution in a United States Court even though the property seized was by the state or local officers delivered to federal authorities for the purpose of being used as evidence in connection with the prosecution. *Byars* vs. *United States, supra; Feldman* v. *United States* (decided May 29, 1944), 322 U. S. 487, 65 S. Ct. 1082, 88 L. Ed. 1408.

But, in *Elkins* v. *United States*, 364 U. S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, and *Rice* v. *United States*, 364 U. S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1438, decided in June, 1960, it was held that evidence obtained by state or local officers in the course of an unreasonable search, even without participation by federal officers, and not solely for the purpose of aiding in the enforcement of federal law, must be excluded from evidence in the trial of a criminal case in the United States Court. And, in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, decided on June 19th, 1961, it was held in effect that evidence obtained through means of an illegal search and seizure, whether by state, local or federal officers, acting separately or in conjunction,

is to be excluded in the trial of a criminal case either in the state or Federal Court.

It is clear that at the time of the trial it was the then existing rule that evidence secured by state or local officers in the course of an illegal search and seizure whether with or without a warrant was admissible in a criminal prosecution in the courts of New Jersey, and that the challenged evidence was admitted in full harmony with the then existing rule.

At the time of the imposition of sentence upon the defendants, the law in the *Mapp* case was applicable.

POINT I.

There have been a number of developments since the Mapp decision. With respect to the question of whether a pre-Mapp conviction may be assailed on direct appeal, our Supreme Court in *State v. Valentine*, 36 N. J. 41 (decided Nov. 6th, 1961), granted leave to appeal from an interlocutory order denying a pretrial motion to suppress the products of a search.

In *People* v. *Loria*, 10 N. Y. 2d 368, 223 N. Y. S. 2d, 462, 179 N. E. 2d 478 (Ct. App. Nov. 30, 1961), it was held to be clear that Mapp applies to all trials held after the date of Mapp, a majority of the court then holding that, whether or not compelled to do so, *it should apply Mapp to appeals from prior convictions under the general practice of deciding cases in the light of the law at the time of appellate decision.*

In *Commonwealth v. Spofford*, Mass. 180 N. E. 2d 673 (Sup. Jud. Ct. 1962), the court held Mapp had to be applied on a direct appeal from a pre-Mapp conviction.

In the instant case, we are presented with a *collateral attack of the conviction.* With respect to collateral attack or the equivalent, in *People* v. *Friola* (decided April 5, 1962), 11 N. Y. 2d. 157, 182 N. E. 2d, 100, the Court of Appeals of New York said:

Appendix C.

> "We do not reach the question of the alleged illegality of the search and seizure for in our opinion no question of law has been preserved for our review. In this case * * *, no objection was taken on constitutional grounds to the introduction of the alleged illegally obtained evidence. * * * The present record is utterly barren as to any inquiry by the defense counsel with regard to the lawfulness of the alleged search and seizure by means of which inquiry or at least some effort in that direction, defendant might have preserved the question for our review, as the statute requires * * *."

The Court of Appeals of Maryland was faced with a similar question in *Shorey* v. *State* (decided Jan. 23, 1962), 227 Md. 385, 177 A. 2d 245. There, the court rejected appellant's contention with respect to an allegedly illegal search and seizure which took place on May 28, 1960, stating: "The complete answer is that there was no objection in the trial court on the ground of illegal arrest." The majority opinion in the *Mapp* case seem to recognize (367 U. S. 643 p. 659, 81 S. Ct. 1684, note 9, 6 L. Ed. 2d 1081), that the State procedural requirements to raise or preserve the question may still be respected, even where it is claimed that the Fourteenth Amendment is violated by the introduction of illegally obtained evidence in a state prosecution.

The California Supreme Court adopted the Federal exclusionary rule in *People* v. *Cahan* (decided April 25, 1955), 44 Cal. 2d 434, 282 P. 905, 50 A. L. R. 2d 513. In *People* v. *Kitchens* (decided Feb. 24, 1956), 46 Cal. 2d, 260, 294 P. 2d 17, one of the police officers involved was asked on cross examination: "Whether he had a search warrant for defendant's arrest, or any doubt when he entered the apartment and searched defendant that defendant 'was responsible for having possession of marijuana' and a prosecution objection to each question was sustained." (P. 262, 294, P. 2d P. 19.)

Certainly, this cannot be held to be an attack on legality of the search and seizure and the admissibility of evidence obtained thereby, but the court held that under those circumstances it would review the admissibility of the evidence although "proper objection" had not been made in the trial court.

Then, in *People* v. *Farrara* (decided Feb. 24, 1956), 46 Cal. 2d 265 at p. 268, 294 P. 2d 21, at p. 22 the California Supreme Court distinguished *People* v. *Kitchens*, *supra*, and held that where "no objection was made to the introduction of the evidence in the trial court, and no evidence was for the purpose of showing whether or not the officers acted lawfully," the court would not entertain the question of alleged illegal search and seizure. Both *People* v. *Kitchens*, *supra* and *People* v. *Farrara*, *supra*, were tried prior to the *Cahan* case in which California adopted the Federal exclusionary rule.

Our Supreme Court in *State* v. *Smith*, 37 N. J. 481 (decided June 4, 1962) at page 484, with respect to the question presented by this motion, Chief Justice Weintraub stated:

> "We are not dealing with a denial of a right which bears upon the truth of a conviction, as for example the right to counsel or to appellate review. (Citations omitted.) Rather the subject is evidence, the probative force of which is constant whether it is seized with or without warrant. The heroin was heroin, and defendant's connection with it was the same, with or without official compliance with the law of search and seizure. In short, the fairness of the trial itself and the truth of the verdict are not involved. The constitutional injury lies elsewhere. What we have said would bear upon whether a pre-Mapp conviction may be assailed either on direct appeal or on collateral attack."

Appendix C.

Chief Justice Weintraub in *State* v. *Smith, supra,* on appeal considered the question of admissibility of evidence seized before the Mapp decision where the record suggested a basis for questioning the reasonableness of the charge although the defendant had not objected to its admission in the trial; the Chief Justice at page 489 stated:

> "At the trial defendant explored the circumstances of the search and seizure without objection by the State. Perhaps the reason was that we had indicated in Eleuteri *v.* Richman, 26 N. J. 506, cert. denied 358 U. S. 843, 79 S. Ct. 52, 3 L. Ed. 2d 77 (1958), that, while we adhered to the non-exclusionary rule, yet we might depart from it if the facts demonstrated insolence in office as distinguished from a good-faith failure to stay within the technical rules of search and seizure. But, counsel, after thus inquiring into the facts, made no objection to the offer of the articles seized. In footnote 9 to which we have already referred (367 U. S. at p. 659, 81 S. Ct., at p. 1693, 6 L. Ed. 2d, at p. 1092), Mr. Justice Clark said:
>
> > 'As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecution must be respected.'
>
> "Our rules require that objection to the admission of evidence be made at the trial. R. R. 1:5-1 (a). But, since the defense should not be charged with failing to anticipate Mapp, we will accept the issue in this case and decide the appeal on the law is it now exists and the record made below. Whether the issue would be accepted on direct appeal from a pre-Mapp conviction if nothing in the record suggested a basis for questioning the reasonableness of the search, we need not now decide."

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See *People* v. *Farraro*, 46 Cal. 2d 265, 294 P. 2d 21 (Sup. Ct. 1956); *People* v. *Frida*, 11 N. L. Y. 2d 157, 227 N. Y. S. 2d 423, 182 N. E. 2d 100 (Ct. App. 1962).

In *State* v. *Valentin* (decided Nov. 6, 1961), 36 N. J. 41, the defendant was indicted and prior to trial moved in the County Court to suppress the evidence which he alleged was obtained as a result of an unreasonable search and seizure.

The Supreme Court granted leave to appeal and in the Per Curiam decision stated:

> "* * * Undoubtedly, if Mapp had been decided prior to the Motion in the County Court, the Prosecutor would have presented whatever proof he may have had as to the nature of the search and seizure. * * *"
>
> "For that reason, the matter will be remanded to the County Court to permit both parties to introduce all relevant proof on the new issue generated by Mapp."

In *State* v. *Scrotsky* (decided June 29th, 1962), 38 N. J. 14:

> "* * * it has been stipulated that on the occasions of the searches and seizures of the evidence which insured the defendant's conviction, the state had no such warrant. That fact, however, cannot be said to be dispositive on the present record."
>
> "The record is in such a confused state that it cannot be said with any degree of certainty when the searches and seizures were made and under what circumstances."
>
> "Under the circumstances, the applicability of the Mapp rule cannot be determined in the framework of the record before us. We believe however, that the parties should be given the opportunity to explore the matter fully to the end that a just result

> can be reached. Accordingly, the cause is remanded to the trial court so that the State and defendant may add such additional, relevant, clarifying evidence as they wish."

In *In re Harris*, 16 Cal. Rptr. 889, 366 P. 2d 305 (Sup. Ct. 1961), defendant contended, among other things, that the trial court was constitutionally compelled to exclude evidence allegedly obtained in violation of the Fourteenth Amendment and that since its use was a denial of due process he could attack it collaterally. Justice Traynor in his concurring opinion concluded that the policy of finality of judgments precludes a collateral attack on the question of unconstitutionally seized evidence.

The opinion points out, at page 307:

> "* * * On the other hand, the United States Supreme Court has not held that because such use in itself violates the constitution, it may be reached on collateral attack, and in the Mapp case it pointed out that 'As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected' (fn. 9, 81 S. Ct. at p. 1693). * * *"

The Justice pointed out that unlike a denial of the right to counsel, knowing use of perjured testimony or suppression of evidence, the use of an involuntary confession, the use of illegally seized evidence carries with it no risk of convicting an innocent person.

The Justice pointed out, at page 308:

> "* * * The purpose of the exclusionary rule is not to prevent conviction of the innocent but to deter unconstitutional methods of law enforcement (codes cited). That purpose is adequately served when a state provides an orderly procedure for rais-

ing the question of illegally obtained evidence at or before trial and on appeal. The risk that the deterrent effect of the rule will be comprised by an occasional erroneous decision refusing to apply it is far out-weighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack."

The question in the case subjudice was not raised at the pretrial. It was not raised during the trial. It was not raised on appeal to the Appellate Division. It was not raised on petition for certification to the State Supreme Court.

Now the defendants come before this court on a motion for a new trial. Let me ask these questions:

When is a case terminated?

When is the judgment final?

Why did these defendants "reserve" this action?

Why did they not raise the questions at the appeal to the Appellate Division, and then why didn't they raise the questions on certification to the Supreme Court?

What happens to the policy of finality of judgment?

I believe in the quotation used by Chief Justice Weintraub in State v. Smith, "Essential justice both to the individual and to the community."

Therefore, I find that since no objection was made to the admission of evidence pursuant to R. R. 1:5-1 (a), and further the issue was not raised on direct appeal to the Appellate Division nor was it raised on application for certification to the Supreme Court, the motion for a new trial is hereby denied.

In view of my finding there is no need to discuss the question of the legality of the search warrant in the case subjudice.

APPENDIX D.

Indictment No. S-254-60.

SUPERIOR COURT OF NEW JERSEY

BERGEN COUNTY—LAW DIVISION.

THE STATE OF NEW JERSEY *vs.* HARRY JOSEPH KAISER, SUSAN KAISER, EDNA KAISER and JOHN WHITE, also known as JOHN DOE, Defendants.	Indictment No. S-254-60. September Term A.D. 1960. First Stated Session.

The Grand Jurors of the State of New Jersey, for the County of Bergen, upon their oaths present that

HARRY JOSEPH KAISER
SUSAN KAISER
EDNA KAISER

and

JOHN WHITE also known as JOHN DOE, whose true name is unknown to the Grand Jury, on or about the 1st day of March, 1960, and from thence continuously until on or about the 14th day of July, 1960, in the Borough of North Arlington, in the County of Bergen aforesaid and within the jurisdiction of this Court, did commit the crime of Conspiracy in that then and there they unlawfully conspired together to knowingly possess papers, documents, slips and memorandum that pertain to the business of lottery:

OVERT ACTS.

And that in execution of the aforesaid Conspiracy, and to effect the object thereof, the following overt acts were done:

Appendix D.

1. On or about, during and between the 1st day of March, 1960, to on or about the 14th day of July, 1960, in the Borough of North Arlington, county and jurisdiction aforesaid in execution of the aforesaid conspiracy and to effect the object thereof the said HARRY JOSEPH KAISER and SUSAN KAISER allowed and permitted the said JOHN WHITE also known as JOHN DOE, whose true name is unknown to the Grand Jury to occupy premises owned by the said HARRY JOSEPH KAISER and SUSAN KAISER, located at 53 Forest Street, in the Borough of North Arlington.

2. On or about, during and between the 1st day of March, 1960, to on or about the 14th day of July, 1960, in the Borough of North Arlington, county and jurisdiction aforesaid, in execution of the aforesaid conspiracy and to effect the object thereof the said HARRY JOSEPH KAISER borrowed a certain adding machine to be used for the purpose of tabulating bets taken on a lottery policy, so called.

3. On or about, during and between the 1st day of March, 1960, to on or about the 14th day of July, 1960, in the Borough of North Arlington, county and jurisdiction aforesaid in execution of the aforesaid conspiracy and to effect the object thereof the said HARRY JOSEPH KAISER transported the said adding machine to premises located at 53 Forest Street, in the Borough of North Arlington.

4. On or about, during and between the 1st day of March, 1960, to on or about the 14th day of July, 1960, in the Borough of North Arlington, county and jurisdiction aforesaid in execution of the aforesaid conspiracy and to effect the object thereof the said HARRY JOSEPH KAISER, SUSAN KAISER and EDNA KAISER arranged with JOHN WHITE also known as JOHN DOE, whose true name is unknown to the Grand Jury, to use the premises located at 53 Forest Street in the Borough of North Arlington, as a "drop" for the lottery slips and lottery policy slip, so-called and the proceeds collected thereon.

5. On or about, during and between the 1st day of March, 1960, to on or about the 14th day of July, 1960, in the Borough of North Arlington, county and jurisdiction aforesaid, and in execution of the aforesaid conspiracy and to effect the object thereof the said HARRY JOSEPH KAISER, SUSAN KAISER and EDNA KAISER arranged the moneys collected thereon tabulated at the premises located at 53 Forest Street, in the Borough of North Arlington, for the purposes of determining the wins and losses thereon.

6. On or about, during and between the 1st day of March, 1960, to on or about the 14th day of July, 1960, in the Borough of North Arlington, county and jurisdiction aforesaid, and in execution of the aforesaid conspiracy and to effect the object thereof, the said HARRY JOSEPH KAISER, SUSAN KAISER and EDNA KAISER did, at the premises known as 53 Forest Street, North Arlington, tabulate the wins and losses on the lottery slips and lottery policy slips, so called, previously taken by the said JOHN WHITE, also known as JOHN DOE, whose true name is unknown to the Grand Jury and delivered to the said premises.

7. On or about, during and between the 1st day of March, 1960, to on or about the 14th day of July, 1960, in the Borough of North Arlington, county and jurisdiction aforesaid, in the execution of the aforesaid Conspiracy, and to effect the object thereof the said HARRY JOSEPH KAISER, SUSAN KAISER and JOHN WHITE also known as JOHN DOE, whose true name is not known to the Grand Jury, and EDNA KAISER did possess certain papers, documents, slips and memorandum pertaining to the business of lottery and lottery policy, so called; contrary to the provisions of N. J. S. 2A:98-1 and N. J. S. 2A:98-2 and against the peace of this State, the government and dignity of the same.

GUY W. CALISSI,
County Prosecutor.

A True Bill

VOORHIS D. DEMAREST,
Foreman.

APPENDIX E.

Indictment No. S-255-60.

SUPERIOR COURT OF NEW JERSEY

BERGEN COUNTY—LAW DIVISION.

THE STATE OF NEW JERSEY *vs.* HARRY JOSEPH KAISER and SUSAN KAISER, Defendants.	Indictment No. S-255-60 September Term A.D. 1960 First Stated Session

The Grand Jurors of the State of New Jersey, for the County of Bergen, upon their oaths present that

HARRY JOSEPH KAISER

and

SUSAN KAISER

on or about the 1st day of March, 1960, and on divers other days and times between that date and the 14th day of July, 1960, in the Borough of North Arlington, in the County of Bergen aforesaid, and within the jurisdiction of this Court, unlawfully did keep and maintain a certain building and place there situate as a nuisance by then and on the said other days and times in the said building carrying on knowingly by themselves and their agents a business of lottery or lottery policy, so called, and did permit such premises to be used, whereby the law of this State was habitually violated in the said building and place and whereby they the said HARRY JOSEPH KAISER and SUSAN KAISER unlawfully did maintain a nuisance, contrary to the provisions of N. J. S. 2A:130-3, and against the peace of this State, the government and dignity of the same.

A True Bill
VOORHIS D. DEMAREST,
Foreman.

GUY W. CALISSI,
County Prosecutor.

APPENDIX F.

Indictment No. S-256-60.

SUPERIOR COURT OF NEW JERSEY

BERGEN COUNTY—LAW DIVISION.

THE STATE OF NEW JERSEY *vs.* HARRY JOSEPH KAISER and SUSAN KAISER, Defendants.	Indictment No. S-256-60. September Term A. D. 1960. First Stated Session.

The Grand Jurors of the State of New Jersey, for the County of Bergen, upon their oaths present that

HARRY JOSEPH KAISER
and
SUSAN KAISER

on the 14th day of July, 1960, in the Borough of North Arlington, in the County of Bergen aforesaid, and within the jurisdiction of this Court, did then and there being the owners of a building known as 53 Forest Street, in the Borough of North Arlington, County of Bergen aforesaid, unlawfully and knowingly permitted the business of lottery and lottery policy, so called, to be carried on by themselves and their agents, contrary to the provisions of N. J. S. 2A:121-3 (c) and against the peace of this State, the government and dignity of the same.

GUY W. CALISSI,
County Prosecutor.

A True Bill

VOORHIS D. DEMAREST,
Foreman.

APPENDIX G.

Indictment No. S-257-60.

SUPERIOR COURT OF NEW JERSEY

BERGEN COUNTY—LAW DIVISION.

THE STATE OF NEW JERSEY *vs.* HARRY JOSEPH KAISER, EDNA KAISER, SUSAN KAISER and JOHN WHITE a/k/a JOHN DOE, Defendants.	Indictment No. S-257-60. September Term A.D. 1960. First Stated Session.

The Grand Jurors of the State of New Jersey, for the County of Bergen, upon their oaths present that

HARRY JOSEPH KAISER,
EDNA KAISER
SUSAN KAISER and JOHN WHITE a/k/a
JOHN DOE, whose true name is unknown to the Grand Jury, on the 14th day of July, 1960, in the Borough of North Arlington, in the County of Bergen aforesaid, and within the jurisdiction of this Court, knowingly and unlawfully did possess divers papers, documents, slips and memoranda pertaining to the business of lottery and lottery policy, so-called, contrary to the provisions of N. J. S. 2A:121-3 (b), and against the peace of this State, the government and dignity of the same.

GUY W. CALISSI,
County Prosecutor.

A True Bill

VOORHIS D. DEMAREST,
Foreman.

APPENDIX H.

Judgment—S-254-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION
(Criminal)

June 23, 1961

THE STATE OF NEW JERSEY,
vs.
HARRY KAISER,
Defendant.

Judgment
Violation—N. J. S. 2A:98-1 and 2A:98-2.

Indictment for Conspiracy. No. S-254-60.
Term September, 1960. Stated Session Second.
Filed: February 21st, 1961.
Arraigned: March 3rd, 1961.
Plea: Not Guilty.
Retracted: .....
Trial: May 15th to May 18th, 1961.
Verdict: Guilty.
Sentence: June 23, 1961. The Court sentenced the defendant to serve not less than two nor more than 3 years in State prison.

Credit for time served in Bergen County Jail—None.

Reason for Imposition of Sentence (Rule 3:7-10(b):

Defendant was found guilty of a Gambling operation policy Bank involving over $275,000.

Determination of Sentence (Rule 3:7-10(c):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI,
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX I.

Judgment—S-255-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION
(Criminal) June 23rd, 1961

THE STATE OF NEW JERSEY,

vs.

HARRY KAISER,
Defendant.

Judgment.
Violation—N. J. S. 2A:130-3.

Indictment for Maintaining a Nuisance. No. S-255-60.
Term September, 1960. Stated Session Second.
Filed: February 21st, 1961.
Arraigned: March 3rd, 1961.
Plea: Not Guilty.
Retracted: .....
Trial: May 15 to May 18, 1961.
Verdict: Guilty.

Sentence: June 23rd, 1961. The Court sentenced the defendant to serve not less than two nor more than 3 years in State Prison concurrent with sentence imposed on S-254-60.

Credit for time served in Bergen County Jail—None.

Reason for Imposition of Sentence (Rule 3:7-10(b):

Defendant was found Guilty of a Gambling operation policy Bank involving over $275,000.

Determination of Sentence (Rule 3:7-10(c):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI,
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX J.

Judgment—S-256-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION
(Criminal) June 23rd, 1961

THE STATE OF NEW JERSEY,

vs.

HARRY KAISER,
Defendant.

Judgment.
Violation—N. J. S. 2A:121-3.

Indictment for Permitting Lottery of premises.

No. S-256-60.

Term September, 1960. Stated Session Second.
Filed: February 21st, 1961.
Arraigned: March 3rd, 1961.
Plea: Not Guilty.
Retracted: .....
Trial: May 15th to May 18th, 1961.
Verdict: Guilty.

Sentence: June 23rd, 1961. The Court sentenced the defendant to serve not less than two nor more than 3 years in State Prison concurrent with sentence imposed on S-254-60.

Credit for time served in Bergen County Jail—None.

Reason for Imposition of Sentence (Rule 3:7-10(b):

Defendant was found Guilty of a Gambling operation policy Bank involving over $275,000.

Determination of Sentence (Rule 3:7-10(c):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI,
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX K.

Judgment—S-257-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION

(Criminal) June 23rd, 1961

THE STATE OF NEW JERSEY,

vs.

HARRY KAISER,
Defendant.

Judgment.
Violation—N. J. S. 2A:121-3(b).

Indictment for Know. Poss. of Lottery Papers. No. S-257-60.
Term September, 1960. Stated Session Second.
Filed: February 21st, 1961.
Arraigned: March 3rd, 1961.
Plea: Not Guilty.
Retracted: .....
Trial: May 15th to May 18th, 1961.
Verdict: Guilty.

Sentence: June 23rd, 1961. The Court sentenced the defendant to serve not less than two nor more than three years in State Prison, concurrent with sentence imposed on S-257-60.

Credit for time served in Bergen County Jail—None.

Reason for Imposition of Sentence (Rule 3:7-10(b)):

Defendant was found Guilty of a Gambling operation policy Bank involving over $275,000.

Determination of Sentence (Rule 3:7-10(c)):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI,
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX L.

Judgment—S-254-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION
(Criminal)

June 23, 1961

THE STATE OF NEW JERSEY,

vs.

SUSAN KAISER,
Defendant.

Judgment
Violation—N. J. S. 2A:98-1 and 2A:98-2.

Indictment for Conspiracy. No. S-254-60.
Term September, 1960. Stated Session Second.
Filed: February 21, 1961.
Arraigned: March 3, 1961
Plea: Not Guilty.
Retracted: .....
Trial: May 15 to May 18, 1961.
Verdict: Guilty.

Sentence: June 23, 1961. The Court sentenced the defendant to serve an indeterminate term at Clinton Reformatory.

Credit for time served in the Bergen County Jail. None.

Reason for Imposition of Sentence (Rule 3:7-10(b):

Defendant was found guilty of a gambling operation policy bank involving over $275,000.

Determination of Sentence (Rule 3-7-10(c):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI,
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX M.

Judgment—S-255-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION
(Criminal)

June 23, 1961

THE STATE OF NEW JERSEY,

vs.

SUSAN KAISER,
Defendant.

Judgment
Violation—N. J. S. 2A:130-3.

Indictment for Maintaining a Nuisance No. S-255-60.
Term September, 1960. Stated Session Second.
Filed: February 21st, 1961.
Arraigned: March 3rd, 1961.
Plea: Not Guilty.
Retracted: .....
Trial: May 15 to May 18, 1961.
Verdict: Guilty.

Sentence: June 23, 1961. The Court sentenced the defendant to serve an indeterminate term at Clinton Reformatory concurrent with the sentence imposed on S-254-60.
Credit for time served in the Bergen County Jail—None.

Reason for Imposition of Sentence (Rule 3:7-10(b):

Defendant was found guilty of a gambling operation policy bank involving over $275,000.

Determination of Sentence (Rule 3:7-10(c):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI,
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX N.

Judgment—S-256-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION

(Criminal) June 23, 1961

THE STATE OF NEW JERSEY,

vs.

SUSAN KAISER,
Defendant.

Judgment.
Violation—N. J. S. 2A:121-3.

Indictment for Permitting Lottery on Premises.

No. S-256-60.

Term: September, 1960. Stated Session: Second.
Filed: February 21st, 1961.
Arraigned: March 3rd, 1961.
Plea: Not Guilty.
Retracted: .....
Trial: May 15th to May 18th, 1961.
Verdict: Guilty.

Sentence: June 23, 1961. The Court sentenced the defendant to serve an indeterminate term at Clinton Reformatory concurrent with the sentence imposed on S-254-60. Credit for time served in the Bergen County Jail—None.

Reason for Imposition of Sentence (Rule 3:7-10(b)):

Defendant was found guilty of a gambling operation policy bank involving over $275,000.

Determination of Sentence (Rule 3:7-10(c)):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI.
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX O.

Judgment—S-257-60.

COUNTY COURT OF BERGEN COUNTY
LAW DIVISION
(Criminal) June 23, 1961

THE STATE OF NEW JERSEY,

vs.

SUSAN KAISER,
Defendant.

Judgment.
Violation—N. J. S. 2A:121-3(b).

Indictment for Know. Poss. of Lottery Papers. No. S-257-60.
Term September, 1960. Stated Session Second.
Filed: February 21st, 1961.
Arraigned: March 3rd, 1961.
Plea: Not Guilty.
Retracted: .....
Trial: May 15th to May 18th, 1961.
Verdict: Guilty.

Sentence: June 23, 1961. The Court sentenced the defendant to serve an indeterminate term at Clinton Reformatory concurrent with the sentence imposed on S-254-60. Credit for time served in the Bergen County Jail—None.

Reason for Imposition of Sentence (Rule 3:7-10(b)):

Defendant was found guilty of a gambling operation policy bank involving over $275,000.

Determination of Sentence (Rule 3:7-10(c)):

This defendant was neither convicted nor sentenced under the Habitual Criminal Act.

BENJAMIN P. GALANTI,
Judge.

RICHARD F. DORBER,
Clerk.

APPENDIX P.

38 N. J. 310

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HARRY KAISER, *et al.*,

Defendants-Petitioners.

SUPREME COURT OF NEW JERSEY

Sept. 17, 1962

On petition for certification to Superior Court, Appellate Division.

See same case below: 74 Super. 257, 181 A. 2d 184.

BENEDICT E. LUCCHI, Hackensack and ABRAHAM J. SLUBZBERG, Jersey City, for Petitioners.

GUY W. CALISSI and WILLIAM C. BRUDNICK, Hackensack, for respondent.

Denied.

APPENDIX Q.

Order Denying Motion to Vacate Judgments of Conviction and Denying Motion for New Trial.

Application being made to the Court by Irving I. Vogelman, Esq., Attorney for the defendants, in the presence of Guy W. Calissi, Bergen County Prosecutor, by William C. Brudnick, Assistant Prosecutor, for an Order vacating the judgment of conviction heretofore entered in this matter on the 23rd day of June, 1961 and for an Order granting a new trial; and the Court having heard argument and having examined the papers filed herein as well as the briefs filed on behalf of the defendants and on behalf of the State of New Jersey, and being of the opinion that the motion to vacate the judgment of conviction heretofore entered in this matter on the 23rd day of June, 1961 should be denied for the reasons expressed in the oral opinion rendered from the bench; and that the motion for a new trial should be denied;

IT IS, on this 9th day of November, 1962

ORDERED that the motion to vacate the judgment of conviction heretofore entered in this matter and for a new trial be and the same is hereby denied; and

IT IS FURTHER ORDERED that the application for a stay of execution of the sentence pending appeal be and the same is hereby denied.

BENJAMIN P. GALANTI,
J. C. C.

Consented to as to form.

IRVING I. VOGELMAN,
Attorney for Defendants.

APPENDIX R.

41 N. J. 200.

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY, Plaintiff-Respondent, *vs.* HARRY J. KAISER, et al., Defendants-Petitioners.	On Petition for Certification Order Denying Petition

TO APPELLATE DIVISION, SUPERIOR COURT:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-sixth day of November, 1963.

JOHN H. GILDEA
Clerk of the Supreme Court

Filed:

Nov. 26, 1963
John H. Gildea
Clerk.

APPENDIX S.

Statutes and Rules of Court.

N. J. S. 2A:98-1. Conspiracy

Any 2 or more persons who conspire:

a. To commit a crime; or

b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested; or

c. Falsely to institute and maintain any suit; or

d. To cheat and defraud a person of any property by any means which are in themselves criminal; or

e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or

f. To obtain money by false pretenses; or

g. To conceal or spread any contagious disease; or

h. To commit any act for the perversion or obstruction of justice or the due administration of the laws—

Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor. As amended L. 1952, c. 91, p. 425, § 1.

N. J. S. 2A:98-2. Overt Act Necessary; Exceptions

Except for conspiracy to commit arson, breaking and entering or entering, burglary, kidnapping, manslaughter, murder, rape, robbery or sodomy, no person shall be convicted and punished for conspiracy unless some act be done to effect the object thereof by 1 or more of the parties thereto.

2A:121-3. Permitting Lotteries on Premises; Possessing Lottery Paraphernalia; Working for Lottery Business

b. Knowingly possesses any paper, document, slip or memorandum that pertains in any way to the business of

lottery or lottery policy, so-called, whether the drawing has taken place or not; or

c. Being the owner of a building or place where any business of lottery or lottery policy, so-called, is carried on knowingly, by himself or his agent, permits such premises to be so used—

Is guilty of a misdemeanor.

* * * * * * *

2A:130-3. Maintaining Nuisance a Misdemeanor

Any person who maintains a nuisance, as defined in this chapter, is guilty of a misdemeanor.

* * * * * * *

Revised Rules Governing the Courts of New Jersey.

* * * * * * *

3:7-11. New Trial

(a) The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made at any time, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 10 days after verdict or finding of guilty, or within such further time as the court may fix during the 10-day period.

* * * * * * *

3:11-9. Procedure Not Otherwise Specified

If no procedure is specifically prescribed, the courts exercising criminal jurisdiction may proceed in any lawful manner not inconsistent with the Constitution, these rules or with any applicable statute.

APPENDIX T.

United States Statutes.

TITLE 28 SEC. 1257(3)

28 U. S. C. SEC. 1257(3)

§1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX U.

United States Constitution.

* * * * * *

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * *

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of* law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

APPENDIX V.

Motion for New Trial and to Vacate.

To: Hon. GUY W. CALISSI, Prosecutor,
Bergen County,
Court House Annex,
Hackensack, New Jersey.

SIR:

PLEASE TAKE NOTICE that on the 26 day of October, 1962, at 9:30 oclock in the forenoon, or as soon thereafter as counsel may be heard, at the Court House, City of Hackensack, County of Bergen and State of New Jersey, the undersigned will apply to the Honorable Benjamin P. Galanti, Judge of the Bergen County Court, for an Order vacating the judgment of conviction heretofore entered in this matter on the 23rd day of June, 1961, convicting the defendant, Harry Kaiser of violations of N. J. S. 2A:98-1, N. J. S. 2A:98-2, N. J. S. 2A:130-3, N. J. S. 2A:121-3(c) and N. J. S. 2A:121-3(b) and sentencing him to imprisonment for a term of not less than two nor more than three years on each indictment, sentences to run concurrently, and convicting the defendant, Susan Kaiser, of violations of N. J. S. 2A:98-1, N. J. S. 2A-98-2, N. J. S. 2A:130-3, N. J. S. 2A:121-3(c) and N. J. S. 2A:121-3(b) and sentencing her to imprisonment for an indeterminate term on each indictment, sentences to run concurrently, and for an Order granting a new trial for the reasons that:

1. The proof upon which the convictions were based was illegally obtained, and improperly admitted into evidence, as the result of an illegal search and seizure in violation of the 4th and 14th Amendments to the Constitution of the United States *and paragraph* 7, Article 1 of the 1947 New Jersey Constitution.

Appendix V.

2. That the affidavit upon which the search warrant was issued, a copy of which is hereto attached and hereby made a part hereof, was legally defective and contained insufficient facts upon which to base a finding of probable cause.

PLEASE TAKE FURTHER NOTICE, that at the aforesaid time and place the undersigned will apply for an Order granting a stay of execution of the sentences until final disposition of this matter and for an Order permitting continuance of bail until final disposition of this matter, and for such other relief as the Court may deem just and proper.

IRVING I. VOGELMAN,
Attorney for Defendants.

APPENDIX W.

• • • • • •

1:5–1. Review on Criminal Appeals.

(a) In criminal causes, errors apparent on the face of the judgment record shall be reviewable as heretofore. Error in the admission or rejection of testimony, or in the charge of the court, or in the refusal to charge as requested by the defendant, or in the denial by the court of any matter resting in discretion, or in any other ruling or order made during the course of the trial, shall be cause for reversal if specific objection thereto was made and it appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury.

• • • • • •

1:10–2. Certification to the Appellate Division on Petition.

Certification to the Appellate Division is not a matter of right, but of sound judicial discretion, and will be allowed on final judgments only where there are special and important reasons therefor.

• • • • • •

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 742

HARRY KAISER and SUSAN KAISER,
Petitioners,

vs.

THE STATE OF NEW JERSEY,
Respondent.

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

GUY W. CALISSI,
Bergen County Prosecutor,
Attorney for and of Counsel with Respondent, The State of New Jersey,
Court House, Annex,
Hackensack, New Jersey.

RONALD J. PICINICH,
Assistant Prosecutor,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 742

HARRY KAISER and SUSAN KAISER,

Petitioners,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

I

Reference to Official Reports of Opinions Delivered in the Court Below

The petitioners' reference to the opinions below is correct.

II

Counter-Statement Concerning Jurisdiction

We respectfully submit that the decision of the Superior Court of New Jersey, Appellate Division, 74 N. J. Super. 257, 181 A. 2d 184, involved no State statute repugnant to the Constitution of the United States; no title, right, privilege, or immunity was specially set up or claimed under the Constitution of the United States, nor did the said Court decide any federal question of substance not heretofore determined by this Court or contrary to the applicable decisions of this Court.

We respectfully submit that the decision of the Superior Court of New Jersey, Appellate Division, 80 N. J. Super. 176, 193 A. 2d 270, rests on well settled non-federal procedural grounds and therefore, involves no right, privilege or immunity under the Constitution of the United States.

We further respectfully submit that the decisions below are in conformity with the provisions of the Federal Constitution and represent no departure from the applicable decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction by issuing a writ of certiorari to review the decisions of the Court below.

Counter-Questions Presented

1. Have the petitioners' constitutional rights against unreasonable search and seizure been violated when said petitioners, having had every opportunity to raise the *Mapp* issue by way of direct attack in their appeals to the State Courts, failed to ever question the legality of the search and seizure or the admissibility of the fruits thereof during the course of direct review?

2. Does the Constitution of the United States guarantee to these petitioners an opportunity to raise the illegality of a search and seizure via collateral attack upon their final judgments of conviction, when as a matter of State procedure, the Courts of New Jersey have determined that collateral attack shall not serve the office of direct appeal?

III

Counter-Statement of the Case

The petitioners were arrested on July 14, 1960, when State enforcement officers as well as local police, armed with a search warrant, raided premises owned by them. The search resulted in the discovery of more than $265,000.00 in cash, as well as an assortment of adding machines; paper and canvas money bags, money wrappers, adding machine tapes, and a large number of envelopes bearing number slips and plays.

On May 18, 1961 after a four day jury trial during which the legality of the search was never raised, the petitioners were found guilty on four indictments ranging from conspiracy to maintaining a nuisance.

Mapp v. *Ohio*, 367 U. S. 643, was decided by this Court on June 19, 1961, and on June 23, 1961, during an application for a stay of the execution of sentence pending appeal, petitioners' then counsel, Mr. Slurzberg, urged that there existed a substantial question of law generated by *Mapp* which the appellate courts should rule upon. Counsel further believed that this exclusionary rule would be applied retroactively thereby coming within the orbit of the case *sub judice* (page 8 *infra*).

On June 26, 1961, with full knowledge of the *Mapp* decision and its ramifications, petitioners appealed to the

Appellate Division of the Superior Court of New Jersey without ever raising the *Mapp issue*. On November 6, 1961, *State* v. *Valentin*, 36 N. J. 41 (1961) was decided and the Supreme Court of New Jersey indicated its willingness to apply the exclusionary rule to a pre-*Mapp* search and seizure by remanding so that evidence could be taken on the legality of the search. On November 30, 1961, New York's highest court decided it would apply *Mapp* to pending appeals from pre-*Mapp* convictions, *People* v. *Loria*, 10 N. Y. 2d 368, 223 N. Y. S. 2d 462, 179 N. E. 2d 478 (Ct. App. 1961).

On February 26, 1962, the case *sub judice* was argued before the Appellate Division of the Superior Court of New Jersey at which time *Mapp* was never raised. On June 4, 1962, the Supreme Court of New Jersey held that *Mapp* had retroactive effect on pre-*Mapp* searches, and that it would accept the *Mapp* issue on direct appeal from a pre-*Mapp* conviction in, *at least*, cases in which the record suggested a basis for questioning the reasonableness of the search, *State* v. *Smith*, 37 N. J. 481 (1962). On June 25, 1962, petitioners filed their Petition for Certification in the Supreme Court of New Jersey, and once again the search, seizure or the introduction of evidence at the trial was never challenged, although the avalanche triggered by *Mapp* was well underway.

Certification was denied by the Supreme Court of New Jersey on September 17, 1962. Thus, during the entire proceeding on direct appeal within the State court, there was no attempt made to project the *Mapp issue*, although counsel for the petitioners had previously stated that *Mapp* was applicable to the case (page 8 *infra*).

It was only on October 15, 1962, after all direct appeals were exhausted, that the petitioners for the first time attempted to raise the search and seizure issue presented in *Mapp* v. *Ohio*. Having delayed for approximately one year and a half, the petitioners' Motion to Vacate the Judgments

of Conviction and for a New Trial was untimely brought under R.R. 3:7-11, however, the Superior Court of New Jersey, Appellate Division, treated the Motion as an attempt to seek the Court's aid under R.R. 3:11-9. The Appellate Division affirmed the trial court's denial of the aforesaid Motion and the Supreme Court of New Jersey denied certification.

IV

The Argument

Petitioners' trial began on May 15, 1961 and continued to May 18, 1961, when the jury returned a verdict of guilty. At no time during the trial did the petitioners object to the admission of any evidence obtained as a result of the search of July 14, 1960. This inaction, we must admit, was excusable since the petitioners couldn't be charged with failing to anticipate *Mapp*. From this point on, however, their failure to raise the *Mapp* issues was without justification.

On sentencing day, June 23, 1961, petitioners were well aware of the *Mapp* decision and, if the remarks of their State appellate counsel are any indication, were well convinced that *Mapp* applied to their convictions. Nevertheless, despite the hints contained in *State* v. *Valentin*, *supra*, and the precedent set by New York's *People* v. *Loria*, *supra*, petitioners failed to raise this issue in the Appellate Division. Whatever doubts defendants might have retained as to the efficacy of such an assertion should have been quickly dispelled by *State* v. *Smith*, *supra*. Nevertheless, petitioners again failed to raise the issue in their subsequent Petition for Certification.

Early in the *Mapp* opinion, Mr. Justice CLARK quotes *Byars* v. *United States*, 273 U. S. 28, 29-30 (1927) to the effect that the exclusionary rule is only available "where a timely challenge has been interposed" and it is later explicitly stated in *Mapp*, footnote 9, page 659 that:

"As is always the case, however, State procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

One of New Jersey's cardinal procedural principles is that collateral attacks will not be allowed to do service for an appeal: *State* v. *Jenkins*, 32 N. J. 109, 117 (1960); *Janice* v. *McCorkle*, 52 N. J. Super. 1, 19 (App. Div. 1958); *In re Robilotto*, 24 N. J. Super. 209, 211 (App. Div. 1953). Due regard for the orderly administration of justice and the policy of finality of judgments are among the reasons advanced for the existence of this rule. This antipathy toward collateral attack and piecemeal review has been stated on many occasions by this Court; *Sunal* v. *Large*, 332 U. S. 174 (1947); *Cleary* v. *Bolger*, 371 U. S. 392 (1963); *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 274 (1942); *Daniels* v. *Allen, sub nom. Braum* v. *Allen*, 344 U. S. 433; *Chovez* v. *Dickson*, 280 F. 2d 727, 733 (9th Cir. 1960) cert. den. 364 U. S. 934 (1961).

It is also not without significance that before the advent of *Mapp*, the lower federal courts have consistently adhered to the rule that the issue of admissibility of unconstitutionally seized evidence may not be raised on collateral attack; *United States* v. *Zarade*, 291 F. 2d 189, 191 (6th Cir. 1961); *Alexander* v. *United States*, 290 F. 2d 252, 254 (5th Cir. 1961); *Jones* v. *Attorney General of the United States*, 278 F. 2d 699, 701 (8th Cir. 1960). Furthermore, collateral attack has been consistently denied by our sister states; *People* v. *Muller*, 11 N. Y. 2d 154, 227 N. Y. S. 2d 421, 182 N. E. 2d 99 (Ct. App. 1962), cert. den. 371 U. S. 850; *Petition of Dirring*, 183 N. E. 2d 301 (Sup. Jud. Ct. Mass. 1962); *Moore* v. *State*, 146 So. 2d 734 (Ct. App. Ala. 1962); *Commonwealth* v. *Myers*, 199 Pa. Super. 341, 185 A. 2d 806 (Super. Ct. 1962). See also *In re Harris*, 366 P. 2d 305, 16 Cal. Rptr. 889, 890-94 (Sup. Ct. 1961) concurring opinion.

Lastly, it is submitted that the decision sought to be reviewed rests on adequate grounds of State procedure which do not present or constitute a federal question, *Carter* v. *People of State of Illinois*, 329 U. S. 173, 175; 67 S. Ct. 216, 91 L. Ed. 172 (1946); *Young* v. *Ragen*, 337 U. S. 235, 238, 69 S. Ct. 1073, 93 L. Ed. 1333, (1948); *Milk Wagon Drivers' Union of Chicago, Local 753* v. *Meadowmoor Dairies, Ill.*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941).

CONCLUSION

The attempt by petitioners to have their matter reviewed by the Supreme Court of the United States should fail because the Constitutional rights or privileges which the petitioners now claim were never properly raised in the State Courts on direct review. The decisions sought to be reviewed were based on well-settled State decisional law which is in accord with the decisions of this Court and that of our sister-states. There has been no substantial federal question raised meriting review by this Court and based upon all these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Guy W. Calissi,
Bergen County Prosecutor,
Attorney for and of Counsel with Plaintiff-Respondent, The State of New Jersey.

Ronald J. Picinich,
Assistant Prosecutor,
On the Brief

[Appendix Follows]

APPENDIX

Excerpts from Argument on Application for Stay of Execution of Sentence Pending Appeal of the Bergen County Court, Law Division (June 23, 1961)

(commencing at 21-19)

The Court: Tell me.

Mr. Slurzberg: I don't know whether your Honor is familiar with the fact that on Monday of this week an opinion was rendered, and in light of that opinion—and I am sorry that the official opinion is not available—but I am satisfied that there is in this case a meritorious and substantial (22*) question of law that the appellate courts should consider with respect to whether or not the subpoena upon which this arrest was made—

The Court: You mean the search warrant.

Mr. Slurzberg: —was valid, and whether the taking of all the monies was valid.

I believe that in light of the law that came down by the Supreme Court effective and retroactive because it came out before the imposition of sentence, is a matter that an appellate court should weigh.

In this case it is a matter of novel importance. It has never been made before. There is no criticism to the court, to this court, with respect to the merits. It is within the orbit of this case. It is something that is important enough to warrant a stay, so that the appellate courts can rule upon it.

I feel that squarely in this case it comes within the decision of the United States Supreme Court and it is a substantial question because, otherwise I don't think I could raise it.

* * *

*All figures in parentheses indicate the number of each new page of the stenographic transcript.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 742

HARRY KAISER and SUSAN KAISER,
Petitioners,

vs.

THE STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS AND SUPPLEMENTAL APPENDIX

JOHN J. CORCORAN, JR.,
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Jersey City 2, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

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HARRY KAISER and SUSAN KAISER,

Petitioners,

vs.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

Supplemental Statement of Case Concerning Extension of Stay of Execution of Sentence

Because of printing difficulties, the Petition for Certiorari filed herein, was not filed by 5 P.M. on January 8th, 1964 but was filed at 9:01 A.M. on January 9th, 1964. Upon that fact being made known to the County Court of Bergen County, Law Division (Criminal), the Court entered a further order on January 30th, 1964, continuing the stay of

execution of sentence upon the two Defendants-Petitioners until "the Supreme Court of the United States acts upon the Petition for a Writ of Certiorari filed with it by said defendants, Harry J. Kaiser and Susan Kaiser, on January 9th, 1964." A copy of said order is made part of the supplemental appendix hereto and is printed as Appendix FF.

ARGUMENT

POINT I

Since the filing of this Petition for Certiorari on January 9th, 1964, there has been published in the Advance Sheets of February 17th, 1964 of the current decisions of the Circuit Courts of Appeals, a decision of the Ninth Circuit Court of Appeals in the case of *People of the State of California* v. *Hurst*, 325 F. 2d 891, which upholds the point Petitioners have been making since they first had an opportunity to raise it on the record made at the trial court, i.e. that the decision of the Supreme Court of the United States in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) should be given retroactive effect to "pre-*Mapp*" convictions in the State courts, where the evidence, under *Wolf* v. *Colorado*, 338 U. S. 25, and *Mapp* v. *Ohio*, *supra*, was illegally seized, in violation of the federally protected constitutional rights of the Petitioners under the IVth, XIVth and possibly the Vth Amendments of the Constitution of the United States.

In a well reasoned opinion the Court there considers all of the arguments, pro and con, which could be advanced on this question and particularly considers the reasoning relied upon by the Court in the case of *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963), a decision of the Fifth Circuit Court of Appeals, holding that no retroactive effect should be given to the *Mapp* holding to "pre-*Mapp*" convictions in the State courts regardless of how illegally the evidence was seized.

It is here urged that the decision in *People* v. *Hurst*, should become the accepted law of the land. Even in *Wolf* v. *Colorado, supra*, which did not, at the time it was decided, go so far as to require the State courts to apply the exclusionary bar to illegally seized evidence, it was held that the constitutional right of the defendants under the IVth Amendment to the Constitution of the United States was violated by the illegal *seizure* of the articles, later introduced into evidence. It was only the remedy to be afforded against such violations by State officers that was to be left to the several states to deal with separately. Regardless of how the State courts treated the illegally seized evidence, the injury of the violation persisted and was not dissipated by the State courts' actions; in some cases it was compounded.

The remedy afforded the citizens by the *Mapp* decision should not be limited to those violations of their constitutional rights that either occurred after the decision or occurring before the decision, were still to be urged at a later trial as a barring to the use of the fruits of the violation. The remedy afforded by *Mapp* should be extended to all violations, "pre-*Mapp*" violations and "post-*Mapp*" violations, where the reach of this court can still extend to remedy them.

POINT II

(a)

The State of New Jersey, as far as its Brief in opposition indicates, is still urging that these Petitioners should not have the conceded violations of their federally protected constitutional rights either considered or vindicated.

The sole basis of its argument to that effect is that these Defendants-Petitioners had an opportunity to raise the question of the invalidity of the search and seizure under

the search warrant (which is now conceded to have been issued improperly) at the time of argument of their appeal to the Appellate Division and at the time of Petitioning for Certification to the New Jersey Supreme Court. This is, and has been, the position of Judge GALANTI at the trial level; it is and has been the position of the Appellate Division of the Superior Court on the second appeal (A-158-62), and is the present position of the State of New Jersey, as far as its Brief reflects.

A thoughtful review of the State's position establishes these facts:

(a) that the State has not at anytime considered or determined the violation of the federally protected constitutional rights of the Petitioners on the merits.

(b) that on the *record which was before the Appellate Division* on the appeal from their conviction and which was the record in the New Jersey Supreme Court on their Petition for Certification (a record wholly devoid of any challenge to the warrant, the affidavit on which it issued, or to the admission at the trial of the illegally seized evidence), the point could not have been successfully raised, urged or argued as a ground for reversal in either court, that their federally protected constitutional rights against illegal search and seizure had been violated.

It was only when the Petitioners went back to the trial court after the denial of Certification by the Supreme Court of New Jersey, that the record, for the first time and then thereafter, reflected their asserted challenge to the violation of their rights under the IVth, Vth and XIVth Amendments. On the state of the record earlier, their argument on this point would have been unavailing *State* v. *Smith*, 37 N. J. 481, at bottom of pg. 489, the last New Jersey de-

cision prior to filing the Petition for Certification on June 25th, 1962.

To say now that the failure to raise that which was unavailable at the time of their appeal and at the time of their Petition for Certification, bars it from being raised now or at any other time, is, in effect, to say it can not be raised at all.

It was from this blind-alley reasoning that this Court decided the case of *Fay* v. *Noia*, 372 U. S. 391, 9 L. Ed. 2d 837 (1963).

It is from this same kind of reasoning that this Court should review the refusal of the State of New Jersey to afford any relief to Petitioners for the conceded violations of Petitioners' rights under the Constitution of the United States, which up until now have never been considered on their merits.

(b)

Following the filing of the Petition for Certiorari herein on January 9th, 1964, there was published in the Advance Sheets of January 10th, 1964, a decision of the Appellate Division of the New Jersey Superior Court entitled *State* v. *Calabro*, 81 N. J. Super. 422, decided on December 17, 1963.

In this latest case the Appellate Division shows an inclination to hold that the *Mapp* decision should have at least *some* retroactive effect to "pre-*Mapp*" convictions, where the affidavit for the search warant was deficient and the articles illegally seized under it were admitted into evidence at defendant's trial.

Earlier, in 1962, in *State* v. *Smith*, *supra*, the New Jersey Supreme Court was not ready to meet the question; at least where the record before them contained no showing

on the legality of the search and seizure. Now it is the Appellate Division, the same Court which would not hear Petitioner's claims in June of 1963, that is coming around to accept the idea that it was a constitutional *right* that was violated *when* the illegal search and seizure were made and the later admission into evidence at the trial, of the illegally secured articles was only a compounding of the earlier violation.

In the cited case (*State* v. *Calabro*), the issue of "illegal search and seizure" was not raised at the trial, though the trial took place three months after the *Mapp* decision. It was raised for the first time on appeal but the Appellate Division nonetheless did not deny all relief because of that failure, even though the State urged that the failure should preclude the raising of the point on appeal.

The Court remanded the case to the trial court for further inquiry as to the possible validity of the search notwithstanding the deficient warrant, because it concluded that the defendant should not be prejudiced by his counsel's misapprehension concerning the scope of the *Mapp* decision.

The Court in the *Calabro* opinion also referred to the holding of the New Jersey Supreme Court in the case of *State* v. *Doyle*, 40 N. J. 320 (1963) where the defendants failed to raise the question of the unlawful search and seizure not only at the trial level but also on the subsequent appeal to the Appellate Division as well. The point was raised for the first time on *argument* before the New Jersey Supreme Court, where the matter was before the Court on appeal as a matter of right. (In this we have the only distinction between the *Doyle* case and the present case; the present Petitioners had reached the Supreme Court without having raised the search and seizure question as a matter of grace on their Petition for Certification; it was denied without *argument* or opinion.)

In the *Doyle* case, *supra*, the New Jersey Supreme Court remanded the case to the trial court for the taking of testimony as to why the defendant had failed to raise the issue of illegal search at both the trial and appellate levels and as to whether the search and seizure could be validated on other grounds than the warrant.

Such action could and should have been the disposition of these Petitioners' appeal in their second appeal to the Appellate Division (A158-62).

POINT III

(a)

Petitioners also urge the Court to grant certiorari in this case that brings before this Court for the first time the question of whether the holding in *Mapp* v. *Ohio*, *supra*, is to be given a retroactive effect to State Court convictions that occurred prior to "*Mapp*", or as they may be designated, "pre-*Mapp*" convictions, where the State, at the time of the trial and conviction, was not following the exclusionary rule regarding illegally seized evidence which rule has been applied in the federal courts since *Weeks* v. *United States* (232 U. S. 383 (1914)), was decided.

Under this heading Petitioners urge, as a further reason for the Court to grant certiorari, the need to have resolved the conflict of decisions between the Fourth and Ninth Circuit Courts of Appeals on the one hand and the Fifth Circuit Court of Appeals on the other on this very question of whether *Mapp* v. *Ohio* is to be given retroactive effect to "pre-*Mapp*" convictions in the State Courts where the States were not following the exclusionary rule of *Weeks* v. *United States*, referred to above. This conflict of decision has become prominent by the latest decision of the Ninth Circuit Court of Appeals in *People of the State of California* v. *Hurst*, reported in 325 F. 2d 891. Advance sheets

of February 17, 1964, where rehearing was denied on January 27, 1964 and the opinion in that case published after the Petition for Certiorari in the present case was filed on January 9th, 1964. Earlier, the opinion of the Fourth Circuit Court of Appeals in *Hall* v. *Warden, Maryland Penitentiary*, reported in 313 F. 2d 483 (1963) cert. den. sub. nom. *Pepersack* v. *Hall*, 374 U. S. 809, 83 S. Ct. 1693, 10 L. Ed. 1032 (1963) also held that the holding of the Supreme Court in *Mapp* v. *Ohio* was to be given retrocative effect to "pre-*Mapp*" convictions where otherwise applicable.

The decision of the Fifth Circuit Court of Appeals in *United States, ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (1963) held that the ruling in *Mapp* was not to be applied retroactively to "pre-*Mapp*" convictions in the State courts in order to reopen the convictions, even though the evidence may have been illegally secured and illegally admitted into evidence at the trial, as the "illegality" of the seizure is now considered in the light of the *Mapp* holding.

That there exists conflicts of decisions on this question between the Circuit Courts of Appeals was recognized by the Ninth Circuit Court of Appeals in the Decision of *People* v. *Hurst, supra*, at page 894 of 325 F. 2d the Circuit Court itself stated the situation in the words appearing in footnote 1.

To resolve the substantial federal question presented by this Petition for Certiorari as well as to resolve the conflict of decisions now existing between the Fourth and Ninth

---

[1] "The keystone question in the instant case remains unresolved by the Supreme Court: whether the *Mapp* and *Ker* cases are to be given retroactive effect where, as here, the search, the trial, the motion to suppress, the denial thereof, the conviction, and the exhaustion or expiration of remedies of direct review occurred prior to June 19, 1961, the date of the Supreme Court's decision in Mapp."

Circuits on the one hand and the Fifth Circuit on the other, it is urged that this Court grant certiorari here rather than denying certiorari and relegating the Petitioners to bring their federal constitutional question before Federal Courts by returning to the State trial court and surrendering themselves for execution of the sentences imposed on them and then applying to the United States District Court for Habeas Corpus relief, with subsequent review by the Circuit Court of Appeals and a further application to this Court for Certiorari.

The question is substantial enough in itself without the presence of "conflict of decision" for the Court here to grant review by certiorari, particularly so since it is conceded by the State that the search warrant was deficient. The State courts are faced with the problem recurrently and have no adequate guide. The presence of the conflict of decisions is a further moving reason for the Court to act and why certiorari should be granted.

(b)

Because of the broad public impact of the question raised on this Petition for Certiorari and the nationwide effect that a resolution of the conflict of the decisions between the different Circuits would have, Petitioners, through their counsel, have called the attention of the Solicitor General of the United States to the present application by the Petitioners and that one of the grounds they would urge for the allowance of the Writ would be the "conflict of decisions" between the several Circuits. They have furnished to the Solicitor General a copy of their Petition for Certiorari, a copy of the Brief of the State of New Jersey in opposition thereto and a copy of this Reply Brief and have suggested to him that because of the importance of the question and the importance that a decision reached by this Court on the "conflict of decision" problem would have in the further

administration of the criminal law throughout the States, he might wish to file a brief as "*Amicus curiae*" or take some other action regarding this present application for certiorari.

CONCLUSION

For the reasons presented under the several separate headings it is urged that the Writ be allowed and that review be accorded.

Respectfully submitted,

JOHN J. CORCORAN, JR.,
Attorney for Petitioners.

APPENDIX AA

Application for Search Warrant

STATE OF NEW JERSEY }
COUNTY OF BERGEN } ss.:

On this 14th day of July, 1960, before me, the undersigned Judge of the Superior Court of the State of New Jersey, personally appeared Detective Robert W. Green of the New Jersey State Police, who, being duly sworn on his oath according to law, deposes and says—

1. I reside at New Jersey State Police Headquarters, in the Township of Ewing, County of Mercer, State of New Jersey.

2. I have good reason to believe, and do believe, that in and upon certain premises within the Borough of North Arlington, County of Bergen, State of New Jersey, to wit: premises known as 53 Forest Street, and more particularly described as follows: a one-story brick house with attached garage, occupied by and under the control of unknown persons, there have been and now are being conducted the illegal practices commonly known as bookmaking and maintaining a lottery in violation of the laws of the State of New Jersey, to wit: N.J.S. 2A:112-3 and N.J.S. 2A:121-3.

3. That the facts tending to establish the grounds for this application, and the probable cause of the deponent's belief that such grounds exist are as follows: Information given to the deponent to the effect that bookmaking and a lottery are being conducted within the above-described premises.

4. WHEREFORE, I respectfully move that a search warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

Detective ROBERT W. GREEN

(Sworn to July 14, 1960.)

APPENDIX BB

Search Warrant

STATE OF NEW JERSEY,
COUNTY OF BERGEN, } ss.:

TO THE SHERIFF OF THE COUNTY OF BERGEN, AND TO ANY COUNTY DETECTIVE OF THE COUNTY OF BERGEN, OR TO ANY POLICE OFFICER OR TO ANY STATE POLICE OFFICER OF THE STATE OF NEW JERSEY:

WHEREAS, Detective Robert W. Green of the New Jersey State Police has this day made information on oath before me, Victor S. Kilkenny, a Judge of the Superior Court, State of New Jersey, that the illegal practices commonly known as bookmaking and maintaining a lottery, in violation of N.J.S. 2A:112-3 and N.J.S. 2A:121-3, are being carried on at the premises occupied by unknown persons, situated at 53 Forest Street, Borough of North Arlington, County of Bergen, State of New Jersey, and that he, the said Detective Robert W. Green, has just and reasonable cause to suspect, and does suspect, that the illegal practices commonly known as bookmaking and maintaining a lottery are being carried on in a one-story brick house with garage attached, at 53 Forest Street, Borough of North Arlington, County of Bergen, State of New Jersey.

These are, therefore, in the name of the State of New Jersey authorized and commanded to, with the necessary and proper assistance, enter into the said building by day, at 53 Forest Street, Borough of North Arlington, County of Bergen, State of New Jersey, and there diligently search. And if you there shall find that the illegal practices commonly known as bookmaking and maintaining a lottery are being conducted, take into your possession all property,

including monies, used as a means of carrying on the illegal practices commonly known as bookmaking and maintaining a lottery which may be found on the said premises to the end that the same may be dealt with according to law.

You are further commanded in the event that you seize any of the above-described articles, to give a copy of this warrant together with a receipt for the property so seized to the person from whom it is taken or in whose possession it is found, or in the absence of such person to leave a copy of this warrant, together with such receipt, in the place where the said property is found.

You are further commanded to execute this warrant within ten days from the issuance hereof and forthwith make return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand on this 14th day of July, 1960.

/s/ VICTOR S. KILKENNY,
Judge of the Superior Court.

APPENDIX CC

Confiscated Items

County Clerk's Office
Hudson County, N. J.
Oct. 4, 12:20 P.M., 1962

7-14-60

The following items were confiscated from the premises of 53 Forest St. No. Arlington, N. J.

1 Bottle of medicine prescribed to J. Moriarty dated 7-10-59

1 vial of pills prescribed to J. Moriarty dated 1-9-60

$271,133.00 in strong box, also strong box

3,650.00 in drawer of bedroom

6,512.30 in cedar chest & china closet in room adjacent to kitchen

164.71 on Harry Kaiser's person

$281,460.01 Total (Correct count Total—$275,841.85)
(count taken by Treasurer's office)
F.P.C. M.B. E.S.U.

A quantity of loose change

1 R. C. Allen Adding Machine Ser. #1054286 taken from bedroom.

1 Victor electric adding machine Ser. #530494

1 Burroughs Add. Machine Ser. #B-38957

1 Remington Rand Add. Mach. Ser. #71-1340615

1 RCA Victor Radio Ser. #4048736

Appendix CC

1 Steelmast drawer type filing cabinet containing records of thousands of numbers plays.

1 Army Field Jacket

Numerous paper & cloth bags

5½ Boxes of envelopes

4 Boxes of note book fillers.

Thousands of slips of number plays.

2 Pink plastic waste-baskets with old slips & tapes.

1 Box containing adding machine tapes.

7 Shirts

DET. 2/c R. W. ALLEN, #762

(*Note*: The above is in longhand on return.)

APPENDIX DD

Hudson County Clerk's Certification

STATE OF NEW JERSEY

HUDSON COUNTY, ss:

I, JOHN GROGAN, Clerk of the County of Hudson aforesaid and also Clerk of the Hudson County Court (Criminal Branch) holden therein

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of Application for Search Warrant, Search Warrant and Return in the case of the State of New Jersey County of Bergen vs. Unknown Persons situated at 53 Forest Street, Borough of North Arlington, County of Bergen, as the same is taken from and compared with the original as filed and recorded in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, at Jersey City this Twenty-seventh day of January, 1964.

JOHN J. GROGAN,
Clerk.

(SEAL)

APPENDIX EE

Timetable of Proceedings

7-14-1960	Application for Search Warrant, Search Warrant Issued
7-14-1960	Search, Seizure and Arrest of Defendants
2-21-1961	Indictments returned
5-15-1961	Trial on Indictments commenced
5-18-1961	Verdict of Jury of Guilty and conviction
6-19-1961	Decision in Mapp v. Ohio, United States Supreme Court, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081
6-23-1961	Defendants sentenced on convictions
	Notice of Appeal to Appellate Division, Superior Court filed
	Brief and Appendix of Appellants filed,
11- 6-1961	Decision of Supreme Court of N. J. in State v. Valentin 36 N. J. 41, 174 A. 2d 737
2-26-1962	Argument of Appeal in State v. Kaiser, before Appellate Division of Superior Court of New Jersey
5-14-1962	Judgment and opinion of Appellate Division, Superior Court of New Jersey affirming conviction,
6- 4-1962	Decision of Supreme Court of New Jersey in State v. Smith, 37 N. J. 481,
6-25-1962	Printed Petition for Certification filed in the Supreme Court of New Jersey to review the

judgment of the Appellate Division of the Superior Court, (A-819-60) affirming the conviction of defendants.

9-17-1962 Petition for Certification to review judgment of Appellate Division, Superior Court, denied without oral argument or opinion,

10-26-1962 Motion filed by defendants with County Court of Bergen County to vacate judgments of conviction and to grant a new trial based upon the illegal search for and seizure of the proofs upon which the convictions were based and the insufficiency of the application upon which the search warrant was issued,

11- 9-1962 Argument on motion to vacate judgments of conviction, opinion denying motion to vacate judgments of conviction, and formal order denying motion to vacate judgments of conviction and for a new trial,

Notice of Appeal to Appellate Division, Superior Court from order of County Court denying motion to vacate etc. filed,

6-10-1963 Argument of Appeal in State v. Kaiser before Appellate Division of Superior Court of New Jersey from denial of motion to vacate judgments of conviction and for a new trial,

7-17-63 Judgment and opinion of Appellate Division, Superior Court, of New Jersey affirming denial by County Court of Motion to Vacate judgments of conviction and for a new trial,

Appendix EE

Printed Petition for Certification filed in the Supreme Court of New Jersey to review the judgment of the Appellate Division of the Superior Court (A-158-62) affirming denial by County Court of Motion to vacate judgments of conviction and for new trial,

11-26-1963 Petition for Certification to review judgment of Appellate Division, Superior Court, (A-158-62) denied without oral argument or opinion,

12- 9-1963 Application to County Court of Bergen County for a stay of execution of sentence to permit application to the Supreme Court of the United States for a Writ of Certiorari to review the judgments of the Appellate Division, Superior Court of New Jersey and of the Supreme Court of New Jersey denying Petitions for Certification,

12-11-1963 Order of County Court of Bergen County granting stay on condition that Petition for Certiorari be filed in the Supreme Court of the United States within 30 days of cember 9, 1963,

1- 9-1964 Petition for Certiorari to review the judgments of the Appellate Division of the Superior Court of New Jersey and the denials of the Petitions for Certification by the Supreme Court of New Jersey to review the said judgments of the Appellate Division, filed in the Supreme Court of the United States,

1-30-1964 Order of County Court of Bergen County extending stay of execution of sentence until the Supreme Court of the United States acts on the Petition for Certiorari filed with it.

APPENDIX FF

Order Extending Stay of Execution of Sentence

Application having heretofore been made to the Court on December 9th, 1963, for an order staying the execution of the sentences imposed upon the defendants, Harry J. Kaiser and Susan Kaiser, upon their convictions of the charges laid in the indictments returned against them to enable them to make application to the Supreme Court of the United States for a Writ of Certiorari to review the action of the Bergen County Court, Law Division (Criminal) in denying their application to vacate the judgments of conviction against them and for a new trial on said indictments and of the judgment and decision of the New Jersey Superior Court, Appellate Division, in affirming the said actions of the Bergen County Court, Law Division (Criminal), and of the denial by the Supreme Court of New Jersey of their Petition for Certification to review the action of the New Jersey Superior Court, Appellate Division, in affirming the said action of the Bergen County Court, Law Division (Criminal), on the ground that their conviction, being a pre-Mapp conviction, should be set aside because it was had in violation of their federal constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution, and that defendants had raised their federal constitutional questions at the earliest possible moment, based on the record made in this trial court at which they were convicted and had raised them in a proper manner but they had not been passed upon on the merits by the trial or appellate courts,

And the Court, on December 9th, 1963, having granted a stay of execution of sentence and having permitted the defendants to remain enlarged on bail, conditioned on their Petition for Certiorari being filed in the Supreme Court

Appendix FF

of the United States within thirty days after December 9th, 1963 and if so filed, to continue said stay until said Petition for Certiorari was thereafter acted upon by said Supreme Court of the United States,

And it now being represented to the Court by John J. Corcoran, Jr., attorney for said defendants, that due to printing difficulties, said printed Petition for a Writ of Certiorari was not filed in the Supreme Court of the United States within thirty days from December 9th, 1963, namely January 8th, 1964, but was filed in said Supreme Court of the United States at 9 a.m. on January 9th, 1964, a period of sixteen hours later, and application having been made herefor and not objected to by the Prosecutor of the Pleas of Bergen County, New Jersey,

It is, on this 30th day of January, 1964,

ORDERED that the stay of execution of sentence on the defendants on their convictions be extended until the Supreme Court of the United States acts upon the Petition for a Writ of Certiorari filed with it by said defendants, Harry J. Kaiser and Susan Kaiser, on January 9th, 1964.

/s/ BENJAMIN P. GALANTI,
BENJAMIN P. GALANTI,
J. C. C.

I have no objection to the entry of the foregoing Order.

/s/ GUY W. CALISSI,
GUY W. CALISSI,
Prosecutor of the Pleas of
Bergen County, New Jersey.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 742

HARRY KAISER and SUSAN KAISER,

Petitioners,

vs.

THE STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

JOHN J. CORCORAN, JR.,
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15 Exchange Place,
Jersey City 2, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Petitioners petition the Court for a rehearing of their application for a Writ of Certiorari to review the judgment of the Superior Court, Appellate Division of the State of New Jersey, entered on May 14, 1962, affirming the convictions of Petitioners in the Bergen County Court, Law Division, on May 18, 1961 and also the judgment of the Superior Court, Appellate Division of the State of New Jersey, entered on July 17, 1963, affirming the denial by the Bergen County Court, Law Division, of Petitioners'

motions to vacate the judgments of conviction and for a new trial, rendered on December 9, 1962.

1. The Petition for Certiorari herein sought review of the Appellate Court decisions on the grounds that the New Jersey State courts have refused to give any consideration on the merits to Petitioners' federally protected constitutional claims of illegal search and seizure under a conceded, deficiently issued, search warrant; that the assigned reason for doing so, that is, because those claims were not raised on direct appeal, is unwarranted, and unsupportable for, as the *record stood* when the case was first before the Appellate Division on appeal and before the New Jersey Supreme Court on Petition for Certification, the violation of their constitutional rights against illegal searches and seizures could not be successfully urged under existing New Jersey precedents and prevailing rules of practice, which only permitted error in the admission of evidence to be raised on appeal if specific objection was made thereto at the trial.

The Petition for Certiorari herein was filed and served on January 9, 1964. The Brief in Opposition by the respondent, the State of New Jersey, was filed and served on March 11, 1964. Petitioners' Reply Brief was filed and served on March 17, 1964. The Court considered the Petition for Certiorari on these papers.

On March 23, 1964, the Court denied certiorari. The time for filing a Petition for Rehearing will expire on April 17, 1964.

The Superior Court of New Jersey, Appellate Division, filed an opinion affirming the convictions of Petitioners which appears in 74 N. J. Super. 257, 181 A. 2d 184 and also filed an opinion affirming the denial by the Bergen County Court, Law Division, of Petitioners' motions to vacate the judgments of conviction and for a new trial, which

appears in 80 N. J. Super. 176, 193 A. 2d 270. The Bergen County Court, Law Division, GALANTI, Judge, filed an opinion denying Petitioners' motions to vacate the judgments of conviction and for a new trial which opinion is unreported but which is printed as Appendix C to the Petition for Certiorari at 25a.

2. Petitioners now petition the Court for a rehearing of the order denying certiorari.

The grounds for this Petition for Rehearing are: At the time the Petition for Certiorari was filed by the Petitioners herein on January 9, 1964, Petitioners were not aware at that time that there was a conflict of decision between the decisions of the United States Circuit Court of Appeals for the Ninth Circuit and the Circuit Court of Appeals for the Fifth Circuit on whether the holding of this Court in *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 1081 (1961), was to be given retroactive effect in State court proceedings to pre-*Mapp* convictions, where it appeared from the record made, that the search and seizure were illegal and the illegally seized evidence had been admitted in the state court trial which had resulted in the conviction of the defendant; the Ninth Circuit Court of Appeals holding (in *People of State of California* v. *Hurst*, 325 F. 2d 891 decided December 19, 1963, rehearing denied January 27, 1964), that retroactive effect was to be given to the *Mapp* holding to pre-*Mapp* convictions in state courts (as was contended for by Petitioners herein in their Petition for Certiorari) and the Fifth Circuit holding (in *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (1963)) that retroactive effect was not to be given to the *Mapp* holding to pre-*Mapp* convictions in the State Courts, even though the evidence on which the conviction rested may have been illegally secured, as this last is now understood in the light of the holdings in *Mapp* v. *Ohio*, *supra* and in the case of *Wolf* v. *Colorado*, 338 U. S. 25.

Petitioners herein became aware of this conflict of decision when the decision in *People, etc.* v. *Hurst, supra*, was published in the advance sheets of Federal Reporter Second on February 17, 1964, following the denial of rehearing therein on January 27, 1964. Petitioners then raised the point of "conflict of decision" in their Reply Brief, filed on March 17, 1964, and called attention of the Court in their Brief to that decision (*People, etc.* v. *Hurst, supra*) and when and where it was published.

Petitioners have most recently learned that the State of California has filed a Petition for Certiorari in this Court on March 13, 1964 (*People of the State of California* v. *Hurst*, No. 913 Oct. Term, 1963) 32 U. S. L. W. 3323), for review of the decision by the Circuit Court of Appeals for the Ninth Circuit in that case. The question(s) brought up for review by that Petition for Certiorari are:

> (1) The retroactive effect to be given in collateral *habeas corpus* proceedings to the *Mapp* decision to pre-*Mapp* convictions in the state courts, where the conviction was obtained on illegally secured evidence and
>
> (2) The lack of reasonable and probable cause to make the arrest and to seize the evidence in the absence of a search warrant.

The first question raised is similar in all respects to the question(s) raised by the Petitioners herein in their Petition for Certiorari, the only difference being that the result in the *Hurst* case is exactly the opposite of the result reached by the New Jersey Courts in the case of these Petitioners, the New Jersey holding being in keeping with the decision of the Fifth Circuit Court of Appeals in the *Linkletter-Walker* case, *supra*.

Both the *Hurst* case and Petitioners' case concern the retroactive effect to be given to the *Mapp* decision to pre-*Mapp* convictions in the State courts, where evidence admitted at the trial of defendants was illegally searched for and seized; the decision of the Circuit Court of Appeals in the *Hurst* case holding that retroactive effect is to be given to pre-*Mapp* convictions in the state courts; the decision of the Appellate Division of the New Jersey Superior Court in Petitioners' case holding to the contrary that retroactive effect need not be given to pre-*Mapp* convictions, unless raised by defendants on direct appeal.

The Petition for Certiorari in the case of *People* v. *Hurst, supra,* is now on the files of the Court, awaiting the coming in of the respondent's Brief in Opposition.

Argument

As "conflict of decision" is raised in the *Hurst* case, *supra,* as a ground for the allowance of the Writ to review the decision in that case, Petitioners herein conceive that the Court will allow certiorari to review that decision, in order to take opportunity on review to resolve the existing conflict of decision between the decisions of the Ninth and Fourth Circuits on the one hand and the Fifth Circuit on the other as to the retroactive effect to be given to pre-*Mapp* convictions in the State Courts.

It is urged that if the Court was to grant certiorari in the *Hurst* case, review on the merits in Petitioners' case would also be appropriate and that both cases should be jointly heard together after full briefing on the merits.

That review and resolution of the question presented by the two decisions, involving as they do a common question of federal law, that is "the retroactive effect to be given to pre-Mapp convictions in the State courts obtained on illegally secured evidence", should not be confined to re-

view in the *Hurst* case but should extend equally as well to the case of these Petitioners and, for the reasons urged, the Order of the Court, denying certiorari herein, should be reopened and set aside and certiorari allowed herein if certiorari is granted in *People etc.* v. *Hurst*, No. 913, Oct. Term, 1963.

Respectfully submitted,

JOHN J. CORCORAN, JR.,
Attorney for Petitioners.

Certificate

I, the undersigned, attorney for Petitioners, do hereby certify that the foregoing Petition for Rehearing is prepared and filed in good faith for the causes stated therein and is not presented for the purpose of delay.

I further certify that the petition is restricted to the ground that if certiorari is allowed in the case of *People etc.* v. *Hurst*, No. 913, Oct. Term 1963, filed subsequent to the Petition herein, review would be equally appropriate in this case, as both cases involve the same common question of federal law, though opposite results were reached in each.

JOHN J. CORCORAN, JR.,
Attorney for Petitioners.